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71-1662

Supreme Court of the United States

No._____

ATLANTIC-RICHFIELD COMPANY,
Petitioner

v.

DREW CHERRY AND FORREST MULLICAN
Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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INDEX

	PAGE
CITATIONS	i
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
First Question Presented For Review	4
Argument	4
Second Question Presented For Review	13
Argument	13
Third Question Presented For Review	17
Argument	17
Fourth Question Presented For Review	20
Argument	20
CONCLUSION	22
CERTIFICATE OF SERVICE	23
APPENDICES	25

CITATIONS

CASES

Arnold v. Panhandle & S.F.R. Co. 353 U.S. 360, 77 S. Ct., 840, 1 L. Ed. 2d 252	10
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines; 369 U.S. 355 (p. 364); 82 S. Ct. 780, (p. 786); 7 L. Ed. 2d 798	10
Chicago, R. I. & T. R. v. Steph 404 F. 2d 291	10
City of Beaumont v. Graham 441 S.W. 2d 829 (S. Ct., 1969)	5,15

Delhi-Taylor Oil Corp. v. Henry 416 S.W. 2d 390 (Tex. Sup. Ct., 1967) 19
Furst-Edwards & Co. v. St. Louis S.W. Ry. Co., 146 S.W. 1024 (CCA., 1912, writ of err. den.) 14
Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S.W. 803 (1924) 19
Gulf Oil Corp. v. Kenneth C. Bivens, 276 F. 2d 753 (p. 756) 17,18,19
Halepeska v. Callihan Interest, Inc. 371 S.W. 2d 368 (Tex. Sup. Ct., 1963) 15
Hammond v. City of El Dorado Springs, 362 Mo. 530, 242 S.W. 2d 479, 31 A.L.R. 2d 1367 (1951) 15,16
Lowery v. Clouse 348 F. 2d 252 10
Martin v. Gulf States Utilities Co. 344 F. 2d 44 9
Ratay v. Lincoln National Life Insurance Company, 378 F. 2d 209, cert. denied; 88 Sup. Ct. 472, 389 U.S. 973, 19 L. Ed. 2d 465 9
R. B. Company v. Aetna Insurance Company, 299 F. 753 9
Scott v. Isbandsten Company 327 F. 2d 113 (1964) ... 6
Skeoch v. Ottley 377 F. 2d 804 9
Waterman S.S. Corp. v. David 353 F. 2d 600, cert. denied; 88 Sup. Ct., 1863; 384 U.S. 972, 16 L. Ed. 2d 683 9
Wood v. Kane Boiler Works, 150 Tex. 191, 238 S.W. 172 15

STATUTES

Title 28, U.S.C.A., Sec. 1254(1) 2
Federal Rules of Civil Procedure
Rule 49 6
Commentaries (under Rule 49) 10

Federal Rules of Appelate Procedure (28 U.S.C.A.),
Fifth Circuit Local Rule 21 20,22
Supreme Court Rules (28 U.S.C.A.), Rule 19 20

TEXTS

31 A.L.R. 2d 1375 (p. 1381) 14
Restatement, Torts, Sec. 343 18

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause, and its denial of Petition for Rehearing.

Opinions Below

A copy of the opinion rendered by the Court below on April 13, 1972, is attached hereto as Appendix I. The order of the Court below overruling Petition for Rehearing on May 8, 1972, is attached hereto as Appendix II.

Jurisdiction

This Honorable Court has jurisdiction over this Application under Title 28, U.S.C.A., Section 1254(1).

Questions Presented

1. Did the action of the trial Court in refusing to accept the original verdict of the jury in answer to special interrogatories deprive the defendant of trial by jury in contravention of the seventh amendment of the Constitution of the United States?

2. Did the evidence in the trial Court establish as a matter of law that the defendants owed no duty to the plaintiffs?

3. Did the finding of the jury in the trial Court that the defendant did not fail to warn the plaintiff or its employer of alleged defects in the premises entitle the defendant to judgment in its favor?

4. Is the summary disposition of two of Petitioner's basic questions of law by the Court of Appeals such a departure from accepted and usual course of judicial procedures as to call for this Court's exercise of its power of supervision?

Constitutional Provisions Involved

The constitutional provision involved in this cause is Amendment Seven to the Constitution of the United States. (Appendix III).

Statement

Petitioner was the defendant in the trial Court and shall be referred to as defendant in this brief. Respondents were plaintiffs in the trial Court below and will be so referred to in this brief. The nature of the case is that plaintiffs were employees of Ellerbee Brothers (who shall hereinafter be referred to as employer or contractor), which company entered into a contract with the defendant, ATLANTIC-

RICHFIELD COMPANY, for the repair of a steel fuel storage tank owned by defendant and located upon premises owned by defendant. While engaged in the repair of such fuel storage tank, a portion of the roof thereof, upon which the plaintiffs were working, collapsed, and the plaintiffs fell some forty (40) feet to the concrete floor of such tank, sustaining personal injuries. Intervenor arrived at a compromise settlement of plaintiffs' workmen's compensation claim, and thereafter plaintiffs brought a third party action against defendant asserting that their injuries were caused by the negligence of the defendant. Texas Employers' Insurance Association intervened to recoup its payments under the Texas Compensation Law.

Trial was to a jury. The cause was submitted to the jury on special interrogatories along with an oral charge concerning the law of the case. In response to such interrogatories, the jury found that the defendant was negligent in (a) failing to provide a reasonably safe place for the plaintiffs to perform their work on the storage tank in question, and (b) failing to adequately inspect the storage tank for dangerous conditions, which were known to the defendant or should have been known to the defendant by the use of ordinary care, and which were not open and obvious to the plaintiffs or their employer, and further found that the defendant had *not* failed to warn the plaintiffs of dangerous conditions, which were known to the defendant or should have been known to the defendant by the use of ordinary care, which were not obvious to the plaintiffs in the performance of their work. They found that the negligence above referred to was a proximate cause of the plaintiffs' injuries. They further found that the plaintiffs' injuries arose from or were intimately connected with defects in the premises, which their employer, Ellerbee Brothers, Inc., had undertaken to repair. They found damages for the plaintiff, DREW CHERRY, in the sum of Ten Thousand and no/100 Dollars ($10,000.00), and for the plaintiff, FORREST MULLICAN, in the sum of One Hundred Fifty Thousand and no/100 Dollars ($150,000.00). The trial judge took the view that the findings of the jury in answer to

Interrogatory No. 3 (that the plaintiffs' injuries arose from or were intimately connected with defects in the premises which their employer had undertaken to repair) was in conflict with the remainder of the verdict and instructed the jury in effect that he assumed that their intention was to award plaintiffs damage since they had answered the damage issue, and if such was their intention, that they would have to change their answer to Interrogatory No. 3 from "Yes" to "No." The jury thereupon retired and changed their answer to such interrogatory, and returned their verdict into Court. At the request of counsel for defendant, the jury was polled and unanimously stated that their original verdict in response to Interrogatory No. 3 was "Yes," and that after being sent back by the Court that they changed their answer to "No." Based upon the changed verdict of the jury, the Court entered judgment for the plaintiffs and against the defendant in the amounts stated above.

The Special Interrogatories submitted to the Jury are contained herein as Appendix IV, and the pertinent portions of the oral charge of the Court are contained herein as Appendix V.

First Question Presented For Review

DID THE ACTION OF THE TRIAL COURT IN REFUSING TO ACCEPT THE ORIGINAL VERDICT OF THE JURY IN ANSWER TO SPECIAL INTERROGATORIES DEPRIVE THE DEFENDANT OF TRIAL BY JURY IN CONTRAVENTION OF THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

Argument

The law is well settled in the State of Texas that the owner or occupier of premises who engages a contractor to make repairs on such premises, owes no duty to the employees of such a contractor with regard to defects in such premises which the contractor has undertaken to repair. If the injuries complained of arise from or are intimately connected

with defects which their employer has undertaken to repair, there is no liability on the part of the owner or occupier of premises to the employees of such a contractor. *City of Beaumont v. Graham*, 441 S.W. 2d 829 (S. Ct., 1969). Obviously neither the trial Court nor the Court of Appeals in this case have any quarrel with the above-stated rule of law. This is apparent because both Courts have considered that the original finding of the jury in response to Special Interrogatory No. 3, in which the jury found that the plaintiffs' injury did so arise from or were intimately connected with defects which their employer had undertaken to repair, was in conflict with what said Courts have considered an "award of damages" made by the jury in response to Special Interrogatory No. 4. The only way that these findings can in any wise be considered to be in conflict is by admitting that the finding in response to Special Interrogatory No. 3 would defeat the plaintiffs' right to recover, and by considering Special Interrogatory No. 4 as an "award" of damages.

The whole thrust of the defendant's position in both the trial Court and the Court of Appeals is that there was not a conflict between these two findings; and, that therefore, the verdict as initially rendered by the jury should have been accepted, the law applied to the findings of fact thereby made, and judgment rendered in favor of the defendant that the plaintiffs take nothing. The *Federal Rules of Civil Prodedure* provide for three methods of submitting a case to a jury. The first is a standard general verdict in which the Court gives a charge on the facts and the law to the jury thereby explaining to the jury what they must believe as a fact in order to find for the plaintiff, and alternatively, what they must believe as facts in order to find for the defendant and explaining such matters of law as are necessary for the jury to reach a conclusion; and then, furnish the jury with verdict forms essentially as follows: "We, the jury, find for the defendant" or "We, the jury, find for the plaintiff and assess his damages at $_____." The other two methods of submission involve special interrogatories. These two methods of submission are set forth in Title 28,

U.S.C.A., *Federal Rules of Civil Procedure*, Rule 49 (a) and 49 (b).[1] This case was *not* submitted under Rule 49 (b) providing for "General Verdict Accompanied by Answer to Interrogatory" for the reason there was no forms for a general verdict submitted to the Jury. This point was clearly covered in the case of *Scott v. Isbrandsten Company*, 327 F. 2nd 113 (1964), in which the Court of Appeals for the Fourth Circuit said:

> The Jury was not instructed to bring in a general verdict either for or against either party, but only to answer Special Interrogatories, and no form of general verdict was provided for jury use. Therefore, the Special Interrogatories must be treated as having been submitted pursuant to Section (a) of Rule 49, which provides for fact finding.

While it may be conceded that if this case had been submitted under Section (b) of Rule 49, and the Jury had found as a fact in answer to a Special Interrogatory, a fact which would absolve the defendant of liability and had answered a general verdict "We find for the plaintiff," that there may have been a conflict. Such is not the case before this Court. The jury did not "find for the plaintiff." All that the jury was called upon to do in response to Special In-

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[1]Rule 49 provides as follows: Rule 49, Special Verdicts and Interrogatories: (a) Special Verdicts. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. In so doing the court omits any issue of fact raised by the pleadings or by the evidence.

terrogatory No. 4 was to find how much damage, if any, the plaintiffs had sustained. How much damages has been sustained is a *fact* which exists without regard to who may be liable for such damages. Perhaps the classic example of how one finding of *fact* may make all other findings of fact totally immaterial is in the case of a trespasser upon the land of another. It is hornbook law in all jurisdictions that a landowner owes no duty to exercise ordinary care with regard to a trespasser; whereas, on the other hand, a landowner has a duty to exercise ordinary care to an invitee. The crucial fact issue in such cases, therefore, always turn on the status of the party seeking recovery, that is to say, was he an invitee or a trespasser? Regardless of how many acts of negligence the landowner may be guilty of and regardless of how much damage may have been sustained if the jury finds as a *fact* that the injured party was a trespasser, he cannot recover. In the pure general verdict submission, the trial Court would give instructions to the jury telling them in effect if you find that the plaintiff was a trespasser, you shall "find for the defendant," or, on the other hand, if you find that the plaintiff was an invitee and that the landowner was guilty of negligence proximately causing damages to the plaintiff, you will "find for the plaintiff," and assess his damages in accordance

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each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment of the special verdict. (b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The Court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers

with the instructions given by the Court. Under such a submission, obviously no conflict could arise.

In a submission under sub-section (b) of Rule 49, the trial Court might submit specific interrogatories to the jury inquiring (1) as to the status of the plaintiff, that is invitee or trespasser; (2) as to various acts of negligence of the landowner; (3) whether such acts were a proximate cause of injury to the plaintiff; and (4) the amount of damages sustained by the plaintiff. In addition, general verdict forms along the line "we find for the defendant" or "we find for the plaintiff in the amount of $_____" would likewise be submitted. Under this form of submission, a conflict could arise between a finding in answer to a special interrogatory that the plaintiff was a "trespasser" and a general verdict in favor of the plaintiffs. This would then bring into play the various rules and case law having to do with the manner of reconciling such a conflict.

Under the pure special interrogatory submission provided for in Rule 49 (a), the *only* conflict which could arise would be if the findings of *fact* by the jury were in conflict with one another. Such would not be the case in our hypothetical trespasser situation. There is no conflict between a finding that a plaintiff was a trespasser and another finding of fact that the same plaintiff had sustained

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and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

damages. The two are in no way inconsistent with one another. The very same thing is true with regard to the case before this Honorable Court. There is no conflict between a finding that the plaintiffs' injuries arose from defects, which his employer had undertaken to repair, and another finding as a *fact* that the plaintiffs had sustained damages. It is not within the discretion of the trial Court to attempt to find some inconsistency, and therefore, refuse to accept the verdict. On the contrary, the rule has been stated thusly:

> Where there is a view of case that makes jury's answers to special interrogatories consistent, they *must* be resolved that way. (emphasis added).

Ratay v. Lincoln National Life Insurance Company, 378 F. 2d 209, cert. denied, 88 Sup. Ct. 472, 389 U.S. 973, 19 Lawyers Ed. 2d, 465 Other cases make the duty on the trial Court equally mandatory.

> Where there was view of case that made jury's answers in special interrogatories consistent in defamation case, they were *required* to be resolved in that way. (emphasis added). *Skeoch v. Ottley*, 377 F. 2d 804, and

> Before a court can disregard the jury's special verdict and remand case for new trial, they *must* whenever possible harmonize jury's answers to special interrogatories. (emphasis added). *Waterman S.S. Corp. v. David*, 353 F. 2d 600, cert. denied, 88 Sup. Ct., 1863, 384 U.S. 972, 16 Lawyers Ed. 2d 683.

> And court *should* make all reasonable efforts to reconcile apparently inconsistent answers in special verdict. (emphasis added). *Martin v. Gulf States Utilities Company*, 344 F. 2d 44, and

> The court is *compelled* to reconcile apparently contradictory conflicting answers to interrogatories. (emphasis added). *R. B. Company v. Aetna Insurance Company*, 299 F. 2d 753.

Furthermore, the failure on the part of the trial Court to

accept findings of fact made by the jury when any theory of the case will allow him to do so is in contradiction of the Seventh Amendment to the Constitution of the United States.

In the case of *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355 at page 364, 82 S. Ct. 780, at page 786, 7 Lawyers Ed. 2d 798, this Honorable Court said:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they *must* be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent result in a collision with the seventh amendment.

Citing *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 77 S. Ct. 840, 1 Lawyers Ed. 2d 889.

The only possible way that it can be considered a conflict between the jury's answer and response to Interrogatory No. 3 (to the effect that the injuries arose out of defects which plaintiffs' employer had undertaken to repair) and a finding of damages in answer to interrogatory No. 4 would be to *assume* that the jury *intended* to award the plaintiffs some amount of damages. The trial Court under the cases cited above was not warranted in arriving at such an assumption. In the first place, the recommended procedure as stated by the Appelant Courts is that in submitting cases on purely special interrogatories as provided by Rule 49 (a), the very purpose is that the jury may answer specific questions of fact without regard to their legal effect. See *Lowery v. Clouse*, 348 F. 2d 252, and *Chicago, R. I. & T. R. v. Steph*, 404 F. 2d 291. Also see the "Commentaries" under Rule 49 in U.S.C.A. wherein it is said among other things:

> Instead of attempting to understand the court's charge, the jury may devote its entire efforts to the task of answering definite questions of *fact*. (emphasis added).

As a necessary corollary to the rule that the Courts have a

duty to reconcile answers to special interrogatories, if at all possible, it likewise follows that the action of the trial Court in this case in *assuming* a conflict where none existed and instructing the jury to retire and change their answer is in contravention of the seventh amendment. The jury originally found as a *fact* that the plaintiffs' injuries arose from defects which their employer had undertaken to repair. This finding of fact, under the law of the State of Texas (and most other jurisdictions) relieves the defendant of any duty to the plaintiff and thereby made all other findings of *fact* including the *fact* that the plaintiffs had sustained damages, wholly immaterial.

Nor is the cursory disposal of this question by the Court of Civil Appeals in any way proper. In the first place, the Court's statement to the effect that "the instructions of the Court *explicitly* charged the jury that it should not reach the issue of damages if it found that the plaintiffs' injuries arose from work intimately connected with the defect, the workmen were being employed to repair" is a misstatement of the record. The whole of the Court's instructions in this regard are set forth as Appendix V. The specific portions which are pertinent hereto are as follows:

> Therefore, the court will instruct you that if you find from a preponderance of the evidence that the plaintiffs' injuries arose from or were intimately connected with the defects in the premises which their employer, Ellerbee Brothers, Inc., are undertaking to repair, you will answer Interrogatory No. 3 "Yes", and find in favor of the defendant and against the plaintiff.

Except in the manner in which they answered the Special Interrogatory submitted to them, either as contended for by the plaintiff or as contended for by the defendant, THERE WAS NO PLACE TO "FIND IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF." To put it another way, the only way that the above quoted instruction could possibly have been construed by the jury was that the court was referring to the manner in which they answered these Special Interrogatories. The only other place in the court's

instructions that this point was touched upon was the following language, which continued immediately after the language above quoted:

> Now, if you find from the preponderance of the evidence that the plaintiffs are entitled to recover damages as a result of some act or omission of negligence, you do not have to find all of the acts or omissions of negligence which the court has charged you as existing, but you merely have to find at least one of the acts or omissions of negligence as the plaintiffs have contended for, that is failure to provide a reasonably safe place to work, failing to adequately inspect the storage tank, or in failing to warn the plaintiffs of the dangerous conditions, and you find any one of these acts or omissions of negligence *against the defendant in favor of the plaintiffs*, and you find that the work which the plaintiffs' injuries arose from were not intimately connected with the defect in the premises which their employer, Ellerbee Brothers, *had undertaken to repair*, then you will find in favor of the plaintiff and give your attention to the issue of damages. (emphasis added).

Again, since there was no place in the jury's charge for the jury to "find in favor of the plaintiffs and against the defendants" or vice versa, except so far as the manner in which they specifically answered the interrogatories, it is quite obvious that the jury was not "explicitly charged" that it "should not reach the issue of damages if it found that the plaintiffs' injuries arose from work intimately connected with the defect the workman were being employed to remedy."

In summary, the jury unanimously found as a *fact* that the defendant owed no duty to the plaintiffs. The jury was polled, and each and every juror individually stated that his answer to Interrogatory No. 3 initially had been "yes", but that subject to the trial Court sending them back to the jury room because of some alleged "conflict" that then and only then had their answer to such interrogatory been "no."

This action on the part of the trial Court has clearly deprived the defendant in this cause of a trial by jury contemplated by the Seventh Amendment of the United States Constitution.

Second Question Presented For Review

DID THE EVIDENCE IN THE TRIAL COURT ESTABLISH AS A MATTER OF LAW THAT THE DEFENDANTS OWED NO DUTY TO THE PLAINTIFFS?

Argument

It was the position of the defendant in the trial Court and in the Court of Appeals that the undisputed and uncontradicted testimony in the trial Court established that the plaintiffs' injuries arose out of or were intimately connected with a defect in defendants' premises, which plaintiffs' employer had undertaken to repair, and that therefore, defendant was entitled to instructed verdict because it owed no duty to the plaintiffs. The testimony bearing upon this question can be summarized as follows. Neither of the injured plaintiffs was in a position to nor were they called upon to testify as to what caused the roof of the tank upon which they were working to collapse. All they knew and all they testified to was that while working on the roof of the tank, it did collapse, allowing them to fall to the floor of the tank. The only testimony produced as to what caused the roof to collapse was that of a superintendent of defendant who had made an inspection subsequent to the occurrence and had concluded that the cause of the collapse was that some bolt securing the supporting structures of the tank had broken, allowing the structural members to fall causing the collapse. That the work of plaintiffs' employer would have included the repair or replacement of these bolts was established by the undisputed testimony of the foreman for plaintiffs' employer, who testified that their work would have included the repair or replacement of all the structural members of said tank including the columns, girders, beams, *and bolts*". THERE WAS NO OTHER TESTIMONY BEARING UPON THE DUTY OF PLAINTIFFS' EMPLOYER TO REPAIR THESE DEFECTS.

In view of the trial Court and the Court of Appeals' handling the question of "conflict", it will be assumed that both of said Courts were of the opinion that the law was as contended for by the defendant, to-wit, that if the plaintiffs' injuries arose from a defect which their employer had undertaken to repair, there was no liability. If such was not the case, then obviously there could be no "conflict" under any circumstances. However, a brief discussion of the law in this regard is thought to be in order.

It is axiomatic that a cause of action based upon negligence consists of four (4) elements, all of which must be present to sustain the cause of action. They are (1) some duty owed by the defendant to the plaintiff, (2) a negligent breach of that duty, (3) that the breach is a proximate cause of (4) damages to the plaintiff. This proposition was perhaps best stated in the Texas cases by the Court in *Furst-Edwards & Company v. St. Louis S.W. Ry. Co.*, 146 S. W. 1024, (Court of Civil Appeals, 1912, writ of err. denied) in the following language:

"That the right of recovery for injuries resulting from negligence is based upon the violation of duty is no invention of the writer. It is so announced in every text-book upon the law of negligence, and is found by direct announcement or by necessary implication in every well-considered case on this subject....The inquiry in each case of alleged damages is, What was the legal duty of the defendant under the circumstances of the case?

Defendant readily concedes that generally speaking a duty exists on the part of a owner or occupier of premises to warn employees of independent contractors of hidden or inherent dangers. It is the defendant's position, however, that this case clearly falls within an equally well-recognized exception to that rule. This exception is set forth in an annotation in 31 A.L.R. 2d 1375, at 1381 as follows:

> An exception to the general rule requiring the owner or occupier of premises (contractors) to furnish a safe place of work to an independent contractor and the latter's employees, the owner or occupier is under no

> duty to protect them against risks arising from or intimately connected with defects of the premises or of machinery or appliances located thereon, which the contractor has undertaken to repair.

The Supreme Court of the State of Texas has repeatedly recognized and adopted this exception as the law of the State of Texas. In the recent case of *City of Beaumont v. Graham*, 441 S.W. 2d 829 (Sup. Ct., 1969), at page 834 quotes the above statement from A.L.R. 2d, and states:

> This Court recognized the exception to an owner's or occupier's duty to an invitee and discussed it at some length in *Wood v. Kane Boiler Works*, 150 Tex. 191, 238 S.W. 172 (1951).

The Court points out that the A.L.R. annotation follows a decision by the Supreme Court of Missouri in *Hammond v. City of El Dorado Springs*, 362 Mo. 530, 242 S.W. 2d 479, 31 A.L.R. 2d 1367, (1951),

> ....in which the Court held that the city was not liable for damages for injuries to an employee of an independent contractor whose contract provided for 'repair' by the contractor of an elevated water storage tank owned by the city. The employee was injured when defective spider rods broke under his weight and he fell. The Court held that the contractor and his employees assumed the risk of all defective conditions, inasmuch as the contract required them to repair all such conditions.

While some cases have used the term "assumption of the risk" or "volenti non fit injuria," the Supreme Court of Texas in *Halepeska v. Callihan Interests, Inc.*, 371 S.W. 2d 368 (Tex. Sup. Ct., 1963) stated that no matter what term is applied to the doctrine, it really boils down to there being no duty when the defects are open and obvious or as well known or should be as well known to the contractor and its employees as to the owner or occupier of the premises.

It is respectfully submitted, therefore, that since the undisputed evidence shows that plaintiffs' employer had

contracted to repair the very defect of which the plaintiffs complain that the defendant herein owed no duty to the plaintiffs and was entitled to judgment as a matter of law.

We feel that the above-quoted language from *Hammond v. El Dorado Springs* with virtually no changes fits this case squarely, to-wit:

> This Court holds that the defendant was not liable for damages for injuries to an employee of an independent contractor whose contract provided for 'repair' by the contractor of a fuel storage tank owned by the defendant. The employees were injured when defective bolts broke under their weight and they fell. This Court holds that the contractor and its employees assumed the risk of all defective conditions, inasmuch as the contract required them to repair all such conditions.

In spite of the foregoing state of the law, and defendant's contentions that the undisputed facts brought this case within such rules of law, the Court of Appeals has disposed of this point with the comment: "The other errors alleged were without merit." This point of law goes to the very heart of any case involving the duties and liabilities of a landowner to the employees of a contractor. That the evidence is as outlined herein, to-wit, that the injuries did so arise, is amply demonstrated by the fact that the jury initially with no difficulty found such to be a fact unanimously and only changed their answer thereto when they were told to do so by the Court. If the evidence does not establish this point as a matter of law and consequently, should not have been submitted to the jury in the first place, then Petitioner respectfully submits that it was incumbent upon the Appellate Court to point out with particularity how the evidence failed in this regard. The defendant's whole case in the trial Court, its Motion for Instructed Verdict, and its Motion for Judgment Non Obstante Veredicto, was fixed upon the theory that it owed no duty to these plaintiffs. Initially a fact finding in the defendant's favor was obtained by the jury. The actions of the trial Court deprived the

defendant of the benefit of such fact finding, the action of the Appellant Court has deprived this defendant of being advised as to how the proof falls short of establishing as a matter of law that this case falls within the no-duty doctrine herein outlined. The effect of the Appellate Court's summary disposition of this point and the one to follow will be discussed in more detail hereafter; however, it is respectfully submitted to this Honorable Court that this point was "not without merit", but on the other hand was controlling of the disposition of this cause.

Third Question Presented For Review

DID THE FINDING OF THE JURY IN THE TRIAL COURT THAT THE DEFENDANT DID NOT FAIL TO WARN THE PLAINTIFF OR ITS EMPLOYER OF ALLEGED DEFECTS IN THE PREMISES ENTITLE THE DEFENDANT TO JUDGMENT IN ITS FAVOR?

Argument

Another point presented to the Court of Appeals for review was that even if the defendant owed some duty to the plaintiff that under the well-recognized law, both in the State of Texas and generally as set out by the Restatement of Torts and as specifically recognized by the Appellate Court below, any duty so owed to an employee of a contractor may be discharged by a warning, and the failure of the plaintiff to obtain a finding of "lack of warning" was fatal to their cause of action, and furthermore, that the undisputed evidence showed that such a warning had been giving, thereby discharging the duty (if any there was) to the plaintiffs. The testimony bearing upon this issue was that defendant's superintendent of inspection had conversed with plaintiffs' employers' foreman prior to the beginning of the work by plaintiffs' employer. The testimony in this regard appears as Appendix VI.

It is the position of the defendant that this testimony clearly establishes that even if the defendant owed some duty to the plaintiffs that this duty was shown to have been discharged as a matter of law. In the case of *Gulf Oil*

Corporation v. Kenneth C. Bivins, decided by the Court of Civil Appeals for the Fifth Circuit in 1960, at 276 Fed. 2d 753, the obligations of a land owner under these circumstances was thoroughly discussed at page 756 thereof. That Court said the following:

> "The liability of the owner or occupier of the premises which harbors a latent, concealed, or inherent defect to the employee of an independent contractor is not absolute and unconditional. It may be discharged by a warning. As set forth in the Restatement.
>
> 'A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
>
> '(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> '(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and
>
> '(c) invites or permits them to enter or remain upon the land without exercising reasonable care
>
> '(i) to make the condition reasonably safe, or
>
> '(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services they are entitled to receive, if the possessor is a public utility.'
>
> Restatement, Torts, Section 343."

The Court goes on to say:

> "Warning was given to White (contractor) and to White's foreman under whose direction Bivins was working. The decisive question then is, was the duty of Gulf to Bivins discharged by the warning given to White and his job foreman?"

In holding the duty was so discharged, that Court said, at page 758:

We are persuaded by both precedent and principle that the owner or occupier of particular property has a duty to warn the employees of an independent contractor who has undertaken to do work on the property, of dangers that are hidden on or inhere in that property, and *that this duty is discharged if those in charge of the work for the independent contractor are given warning or have knowledge of the danger.* (Emphasis added).

This case was decided by the Court of Civil Appeals, Fifth Circuit, in 1960, at which time, the comment was made "the Texas precedents are few." If the Court had any reservations that its interpretation of the Texas law might be in error at that time, it should have no such reservations now. The Supreme Court of Texas laid the question to rest *Delhi-Taylor Oil Corporation v. Henry*, 416 S.W. 2n 390 (Tex. Sup. Ct., 1967), at page 393, when it said:

> This holding brings us face to face with the question of whether an adequate warning to an independent contractor or one supervising his work will discharge the duty of the landowner or occupier to warn the employees of the independent contractor; and we hold it will.

The Court went on to state:

> Our holding here is diametrically opposed to the holding made in *Galveston-Houston Elec. Ry. Co. v. Reinle*, 113 Tex. 456, 258 S.W. 803 (1924); and to hold as we do in this case, we must, and do, overrule that decision.

It is respectfully submitted that the testimony shows that the duty was discharged by actually giving adequate warning to the contractor's supervisor, Perry Parker. It is further submitted that even if no warning had been made at all, there would be no liability. Under the holding of the Court of Civil Appeals, Fifth Circuit, in *Bivins*, where it is said that the duty is discharged if:

> Those in charge of the work for the independent contractor are given warning *or have knowledge of the danger.* (Emphasis added).

It is further respectfully submitted that defendant is entitled to judgment on the verdict of the jury in that it was incumbent in order to sustain a cause of action under the theories stated in the Restatement to obtain a finding of failure to give adequate warning, and that the jury found this fact issue against the plaintiffs.

Fourth Question Presented For Review

IS THE SUMMARY DISPOSITION OF TWO OF PETITIONER'S BASIC QUESTIONS OF LAW BY THE COURT OF APPEALS SUCH A DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES AS TO CALL FOR THIS COURT'S EXERCISE OF ITS POWER OF SUPERVISION?

Argument

As has been explained in the second and third questions presented for review herein, those issues were disposed of by the Court of Appeals with the comment "the other errors alleged were without merit," under the Fifth Circuit's Local Rule 21. It is the position of Petitioner that the use of that Local Rule 21 in a cause of this import and involving questions of law which are the very heart of any cause of action by an employee of a contractor against the owner or occupier of premises is such a departure "from the accepted and usual course of judicial proceedings....as to call for an exercise of this Court's power of supervision" as provided by Supreme Court Rule 19. The "usual course of judicial proceedings" anticipates that a protection of a litigant against errors of law committed by a trial Court is the right of appeal. On such appeal, the rights of the litigant are thought to be protected in that the appellate Court will hear oral arguments and write an opinion setting forth why the alleged errors of the trial Court do not require a different judgment to be rendered. If an Appellant is of the opinion that his case falls squarely under the facts and law within the then existing rules of law as announced by the Courts of Appellant's State if it be a diversity case, and as that law has been recognized in the Court of Appeals in which such State falls, then it is thought that such an Appellant has a right to be told by the Court of Appeals,

either (1) why the facts of the particular case do not bring it under the law thought to be controlling; or (2) that the law thought to be controlling is either wrong (and thereby overruled or disregarded by the Appellate Court); or (3) that the Appellate Court does not interpret the law to be the same as that contended for by the Appellant. It is the opinion of the Petitioner herein, and it has been so pointed out to the Court of Appeals below THAT AN OPINION CANNOT BE WRITTEN ON THE SECOND AND THIRD QUESTIONS PRESENTED TO THIS HONORABLE COURT WITHOUT DOING VIOLENCE EITHER TO THE FACTS OF THIS CASE OR TO THE EXISTING STATUS OF THE LAW. While Appellant is fully cognizant of the fact that the Court of Civil Appeals for the Fifth Circuit (and presumably for the other circuits) has a problem of disposing of the large number of appeals pending before it, it is respectfully submitted that the summary disposition of these two very important points of law with the notation that they are "without merit" without pointing out in what way they are without merit or in what way the Appellant before said Court had failed to establish the evidence so as to bring its defense within the well-established rules of law effectively denies your Petitioner of the right of appeal. No matter how gross the error of a trial Court may have been, a three-judge panel of the Court of Appeals can brush off such error by stating that it is "without merit," and leave the person aggrieved thereby totally without remedy. On the other hand, if the Appellate Court writes an opinion upon such point, it must do one of two things: Either it must misquote the facts and evidence or it must ignore the law. If it does either, then in a proper Motion for Rehearing, such can be pointed out to the Court; further-more, it would be much simpler to point out such error (in the event the Motion for Rehearing was denied) to this Honorable Court by showing the difference in the evidence as cited by the Appellate Court and that contained in the record or by showing how the Appellate Court misconstrued the law. In this connection, Petitioners would welcome a remand to the Court of Appeals with instructions to hear oral arguments and to write an opinion, for as has been stated before, it is the

belief of your Petitioner that an opinion cannot be reduced to writing with the same results being reached as has heretofore been reached.

Conclusion

Appellant is well aware that this Honorable Court must of necessity limit its review of cases and cannot grant a Writ of Certiorari to every applicant who feels that it has been aggrieved. Appellant is further aware that the cursory disposal of Petitioner's complaint that it was deprived of a trial by jury, and the summary disposition of its contention that it was entitled to judgment as a matter of law, are not conducive to the immediate conclusion on the part of this Honorable Court that the questions involved are of sufficient importance to require review by way of certiorari. However, the whole procedure from trial Court through the Court of Appeals have been such that your Petitioner respectfully submits that it has been deprived of a valuable right under the Seventh Amendment to the United States Constitution in that it has been deprived of a fact finding in its favor by the jury by procedures condemned by this Honorable Court; and that furthermore, that the cursory disposition of these points on appeal by the Court of Appeals has in effect denied this Petitioner of due process of law.

It is submitted that this Honorable Court should grant this Application for Writ of Certiorari in order to correct the errors specifically involved in this cause and, as well, to review the operation of the Court of Appeals for the Fifth Circuit's Local Rule 21, and the standards and criteria in connection therewith.

RESPECTFULLY SUBMITTED,

Fuller, Fuller & McPherson
Attorneys for the Petitioner
3800 Park Lane
Port Arthur, Texas 77640

BY: _____
Jep S. Fuller

Certificate of Service

I, Jep S. Fuller, attorney for ATLANTIC-RICHFIELD COMPANY, hereby certify that on the _____day of June, 1972, I served copies of the foregoing Application for Writ of Certiorari on Respondents by mailing properly addressed with postage prepaid to:

Mr. March H. Coffield, Attorney
P. O. Box 670
Jasper, Texas 75951

Jep S. Fuller

APPENDIX I

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3330
*Summary Calendar**

DREW CHERRY, ET AL,
Plaintiffs-Appellees,

versus

THE ATLANTIC-RICHFIELD COMPANY,
Defendant-Appellant,
TEXAS EMPLOYERS INSURANCE ASSOCIATION,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(April 13, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Causalty Co. of N. Y.*, 431 F.2nd 409, Part I (5th Cir. 1970).

PER CURIAM: The court required the jury to return its verdict in the form of answers to special interrogatories. The instructions of the court explicitly charged the jury that it should not reach the issue of damages if it found that the plaintiffs' injuries arose from work intimately connected with the defect the workmen were being employed to remedy. The first verdict both found that the injuries were intimately connected with the defect under repair and returned damage awards for both plaintiffs. Viewed in the most generous way, these answers were wholly inconsistent. It was not error for the court to refuse the answers and return the jury for further deliberation to resolve the conflict. 9 Wright and Miller, Federal Practice and Procedure: Civil 517-18 (1971). The other errors alleged were without merit. AFFIRMED. See Local Rule 21.[1]

---

[1]See *NLRB v. Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970).

APPENDIX II

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3330
*Summary Calendar**

DREW CHERRY, ET AL,
Plaintiffs-Appellees,

versus

THE ATLANTIC-RICHFIELD COMPANY,
Defendant-Appellant,
TEXAS EMPLOYERS INSURANCE ASSOCIATION,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(May 8, 1972)

ON PETITION FOR REHEARING

Before BELL, DYER and CLARK,
Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX III

AMENDMENT VII–CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX IV

EXHIBIT "E"

Filed June 11, 1971

SPECIAL INTERROGATORIES AND VERDICT OF THE JURY

SPECIAL INTERROGATORIES NO. 1

Do you find from a preponderance of the evidence that the Defendant, The Atlantic-Richfield Company, through its agents; servants, employees, or vice-principals, was negligent in any of the following particulars:

A. Failing to provide a reasonably safe place for the Plaintiffs to perform their work on the storage tank in question?
Answer "Yes" or "No."
ANSWER: Yes

B. Failing to adequately inspect the storage tank for dangerous conditions which were known to the Defendant or should have been known to the Defendant by the use of ordinary care, and which were not open and obvious to the Plaintiffs or their employer?
Answer "Yes" or "No."
ANSWER: Yes

C. Failing to warn the Plaintiffs of dangerous conditions which were known to the Defendant, or should have been known to the Defendant, by the use of ordinary care, and which were not obvious to the Plaintiffs or their employer, and which were dangerous to the Plaintiffs in the performance of their work?
Answer "Yes" of "No."
ANSWER: No

If you have answered either 1A, B or C Interrogatory "Yes," answer the following:

SPECIAL INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the fall of Drew Cherry and Forrest Mullican on August 5, 1968, resulting in their bodily injuries?
Answer "Yes" or "No."
ANSWER: Yes

SPECIAL INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that the Plaintiffs' injuries arose from or were intimately connected with defects in the premises which their employer, Ellerbee Brothers, Inc, had undertaken to repair?
Answer "Yes" or "No."
ANSWER: No

SPECIAL INTERROGATORY NO. 4

What amount of money paid now in cash will fairly, adequately and reasonably compensate Plaintiffs, Drew Cherry and Forrest Mullican, for injuries sustained by them

as a result of their injuries and damages?
Answer in dollars and cents.
ANSWER: For the Plaintiff, Drew Cherry: $10,000
For the Plaintiff, Forrest Mullican: $150,000

VERDICT OF THE JURY

We, the jury, return the above answers to the special interrogatories propounded to us herein as our verdict in this case.

6/11/71
Date

/s/ Walter W. Weber
Foreman of the jury

APPENDIX V

Now, we turn to the issues of the defendant and the defendant contends that the plaintiffs were injured as the result of the particular work which their employer, Ellerbee Brothers Incorporated, contracted to do for the defendant. In other words, that the injuries sustained by the plaintiffs arose from or were intimately connected with defects in the premises which their employer, Ellerbee Brothers, Incorporated, had undertaken to repair.

Now, in this connection, the Court would charge you, the owner of premises such as the defendant herein is liable to the plaintiffs herein, if and only if the owner has:

(a) Knowledge or by the exercise of reasonable care should have discovered a condition which if known to it should have realized would have involved an unreasonable risk to them and;

(b) If they had no reason to believe that they would discover the condition or realize the risk involved therein;

(c) Invited or permitted them to enter or remain on the premises without exercising reasonable care to make the conditions reasonably safe or to warn them of such dangerous conditions.

You are further instructed that adequate warnings to the plaintiffs' employer is to be considered by you as adequate warnings to the plaintiffs. Further, the Court would instruct you in order to find that the conditions of the supporting structures of the storage tank in question was open and obvious, you must find from a preponderance of the evidence that the full extent of the condition with all of its details and surrounding circumstances and the full extent of the dangers thereof was known and fully appreciated by the plaintiffs or their employer, Ellerbee Brothers, Incorporated. Otherwise, the condition is not open and obvious.

Therefore, the Court would instruct you that if you find from a preponderance of the evidence that the plaintiffs' injuries arous from or were intimately connected with the defects in the premises which their employer, Ellerbee Brothers, Incorporated, are undertaking to repair, you will answer interrogatory number three yes, and find in favor of the defendant and against the plaintiffs.

Now, if you find from the preponderance of the evidence that the plaintiffs are entitled to recover damages as a result of some act or omissions of negligence which the Court has charged you as existing, but you merely have to find at least one of the acts or omission of negligence as the plaintiffs have contended for, that is failure to provide a reasonably safe place to work or in failing to adequately inspect the storage tank or in failing to warn the plaintiffs of dangerous conditions and you find any one of these acts or omissions of negligence against the defendants in favor of the plaintiffs and you furthermore find that the work which the plaintiffs' injuries arose from were not intimately connected with the defect in the premises which their employer, Ellerbee Brothers, had undertaken to repair, then you will find in favor of the plaintiffs and give your attention to the issue of damages.

APPENDIX VI

Question: With connection – in connection with any inspections of the tank, which had been made prior to the time that you all started working, it has been shown here by the testimony of all parties that Mr. Rollinson had made some inspections, one or more inspection, of the interior of the tank and structures. Do you recall whether or not you had any conversations with Mr. Rollinson concerning what he found in those inspections?

Answer: Well, yes, yes, sir. Cotton is the man that I usually wind up working with mostly, directly, since he is all over the plant –

Question: Incidently, I am not sure I developed it while he was testifying. You referred to Cotton, that is Mr. Christopher Rollinson?

Answer: Yes, sir, that is true.

Question: In your conversation with Mr. Rollinson regarding the inspections, what did he tell you that he had found in his inspections with regard to structural –

Answer: Well, they knew that the structural was bad and or they pointed this out to me and this was my reason for removing the roof to get in there to work on the structural.

Question: All right, sir. Now, when you use the term "the structural was bad," tell us what you mean, please sir.

Answer: Well, we have uprights which we call columns, we have circular beams which we call girders, and then we have connecting members which we call rafters. And these were all bad, primarily the girders and the rafters were bad, the columns were in reasonably good shape.

Question: All right, sir. Anything further with regard to the structural mechanism or the structural putting together that was discussed?

Answer: Well, the tank had been there for this many years and really you – it is kind of a proposition of just correcting things that we run across and you may run into

other things that may need to be repaired which you will repair.

Question: How are these various members, you referred to girders, rafters, columns, how are they connected to one another?

Answer: They are bolted together.

Question: All right. Was there any discussion with regard to the bolts?

Answer: Yes, sir, it was generally assumed that the bolts would be, some of the bolts would be bad, yes.

Question: All right, sir. Now, this – these areas you personally covered with Mr. Rollinson after his inspection, is that correct?

Answer: This is right, yes. They point out to me the things that they want done and this is what I try to do.

Question: All right, sir. Is it correct to say then, Mr. Parker, that before your company started working on the tank itself that you were aware that there were certain component parts of the structural mechanisms that were defective?

Answer: Very definitely.

Question: And these included in part, the rafters, the girders, the bolts?

Answer: Yes, sir.

Question: Is this correct?

Answer: Yes, sir.

INDEX

Page

STATEMENT OF THE CASE 1

ARGUMENT:

REPLY TO DEFENDANT'S FIRST QUESTION PRESENTED FOR REVIEW:

The Action of The Trial Court in Refusing The Jury's Initial Conflicting Findings And Returning Them for Further Deliberations Did Not Deprive Defendant of Trial by Jury under The Seventh Amendment to The United States Constitution 7

REPLY TO DEFENDANT'S SECOND QUESTION PRESENTED FOR REVIEW:

The Evidence in The Trial Court Did Not Establish As A Matter of Law That Defendant Owed No Duty to The Plaintiffs And The Jury Properly Found That Defendant Negligently Breached Its Duties to Plaintiffs, Causing Their Fall and Injuries 15

REPLY TO DEFENDANT'S THIRD QUESTION PRESENTED FOR REVIEW:

The Defendant Was Not Entitled to A Judgment Simply Because The Jury Did Not Find It Failed to Warn Plaintiffs Or Their Employer of Defects in The Premises 27

REPLY TO DEFENDANT'S FOURTH QUESTION PRESENTED FOR REVIEW:

The Summary Affirmative of This Case by The Court of Appeals Was Appropriate And Does Not Call for This Court's Exercise of Its Power of Supervision 32

CONCLUSION 33

CERTIFICATE OF SERVICE 34

APPENDICES:

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

Cases

Page

Alston v. West, 340 F. 2d 856 (7th Cir., 1965) 11, 13

Atlanta and Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355 (1962) 9

Bayamon Thom McAn, Inc. v. Miranda, 409 F. 2d 968 (5th Cir., 1969) 16

Boeing Co. v. Shipman, 411 F. 2d 365 (5th Cir., 1969) 27, 28

C. & R. Transport, Inc. v. Campbell, 406 S.W. 2d 191 (Tex. Sup., 1966) 28

Cherry v. Atlantic-Richfield Co., 456 F. 2d 1310 (5th Cir., 1972) 9

City of Beaumont v. Graham, 441 S.W. 829 (Tex. Sup., 1969) 8, 19, 24, 25, 27, 29

Delhi-Taylor Oil Corp. v. Henry, 416 S.W. 2d 390 (Tex. Sup., 1967) 29, 30

Ellis v. Moore, 401 S.W. 2d 789 (Tex. Sup., 1966) 31

Fort Worth & Denver Ry. Co. v. Thompson, 216 F. 2d 790 (5th Cir., 1954) 17

Gebhardt v. Wilson Freight Forwarding Co., 348 F. 2d 129 (5th Cir., 1965) 16

Gulf Oil Corp. v. Bivins, 276 F. 2d 753 (5th Cir., 1960) cert. denied 364 U.S. 835 ..... 29, 30

Halepeska v. Callihan Interests, Inc., 371 S.W. 2d 368 (Tex. Sup., 1963) 18, 19, 26, 29

Hammond v. City of El Dorado Springs, 242 S.W. 2d 479 (Mo. Sup., 1951) 20

Hernandez v. Employers Mut. Liab. Ins. Co., 346 F. 2d 154 (5th Cir., 1965) 16

Hommel v. Jackson-Atlantic, Inc., 438 F. 2d 307 (5th Cir., 1971) 16

Page

Indamer Corp. v. Crandon, 217 F. 2d 391 (5th Cir., 1954) 16

Kiger v. Terminal R. Ass'n. of St. Louis, (Mo. Sup., 1958) 20

Martin v. Gulf Shares Utilities Co., 344 F. 2d 34 (5th Cir., 1965) 11

McCarthy v. Morrison, 468 S.W. 2d 350 (Tex. Sup., 1971) 15

McVey v. Phillips Petroleum Co., 288 F. 2d 53 (5th Cir., 1961) 10

Nordmann v. National Hotel Co., 425 F. 2d 1103 (5th Cir., 1970) 11-13

Pruett v. Marshall, 283 F. 2d 436 (5th Cir., 1960) 16, 17

Seaboard Air Line R. Co. v. Horowitz, 277 F. 2d 738 (5th Cir., 1960) 17

Smith v. Henger, 226 S.W. 2d 425 (Tex. Sup., 1950) 19, 20, 26 29

Travelers Ins. Co. v. Truitt, 280 F. 2d 784 (5th Cir., 1960) 15

Truitt v. Travelers Ins. Co., 175 F. Supp., 67 (S.D., Tex., 1959) aff'd 280 F. 2d 784 (5th Cir., 1960) 14

Whitman v. Pitrie, 220 F. 2d 914 (5th Cir., 1955) 17

Wood v. Kane Boiler Works, 238 S.W. 2d 172 (Tex. Sup., 1951) 26

Wright v. Kroeger Corp., 422 F. 2d 176 (5th Cir., 1970) 10, 11

Page

United States Constitution

Amendment VII 17

Federal Rules of Civil Procedure

Rule 49 12

Rule 50 16

Rules of the United States Supreme Court

Rule 19 33

Rule 23 1

Rules of the Fifth Circuit Court of Appeals

Rule 21 32

Texts and Articles

31 A. L. R. 2d 1375 19

Lipscomb, Special Verdicts under the Federal Rules, 25 Wash. Law Q. 185 (1940) 15

5A Moore, Federal Practice (2d Ed., 1971) 16

Restatement of Torts 11, 19, 25

9 Wright and Miller, Federal Practice and Procedure (1971) 10, 11, 15

In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71 - 1662

ATLANTIC-RICHFIELD COMPANY,

Petitioner,

v.

DREW CHERRY and FORREST MULLICAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Drew Cherry and Forrest Mullican, respectfully submit that for the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Petitioner's "Statement" does not comply with this Court's Rule 23, subdivision (e) and does not contain all that is material to the consideration of the questions presented. Therefore, Respondents make the following statement of the case.

Petitioner was the defendant, and Respondents were the plaintiffs in the trial court. The parties will be referred to herein by their names or their trial court designations.

On August 5, 1968, plaintiffs, Drew Cherry and Forrest Mullican, were employees of Ellerbee Brothers, a steel plate construction company in Port Arthur, Texas (R. 224, 353, 354). Plaintiffs and a third man, Benny Harvey, were removing plates from the roof of storage tank 521 at defendant's refinery in Jefferson County, Texas (R. 169, 175, 177-180, 224).

Suddenly the center ring girder (also called the circle beam) above one of the tank columns gave way, the storage tank roof collapsed, and plaintiffs fell over 40 feet to the tank's floor (R. 170, 180, 224). There was no warning that the roof was about to collapse (R. 180, 228).

Plaintiffs were both injured in this fall, Forrest Mullican being the more seriously injured. He was hospitalized over two months and he is considered to be permanently disabled to do heavy physical work and has suffered and will continue to suffer physical pain and mental anguish (R. 308, 311-314, 317-321, 470, 481-485).

Storage tank 521 was owned by defendant and was on its premises. It was built in 1923 (R. 161, 162). Apparently no work, maintenance, or repair had been done on it prior to July and August of 1968 (R. 291). About 3 or 4 years prior to the occurrence made the basis of this suit, defendant had determined that "something" was wrong with tank 521 and that it had buckles in the roof (R. 378, 411). No repairs were made then for economic reasons (R. 412). During this 3 or 4 year period, and until the work of removing the tank roof began, in which plaintiffs were engaged at the time of

their fall, defendant had prohibited anyone from going on top of this tank (R. 379, 380, 411).

Prior to the beginning of the work on tank 521 by plaintiffs' employer, two inspections of the upper inside of the roof and inner roof supports of tank 521 were made by Rollinson, defendant's mechanical inspector, to determine what repairs were necessary (R. 163, 278-281, 290, 376, 377, 384, 387). Rollinson was a general inspector for the whole plant to see what repairs or replacements had to be made (R. 375, 376). In July and August, 1968, Rollinson was the only full-time hourly employee performing this type of general inspection work for defendant (R. 375, 408, 409).

On his first inspection, from the floor of tank 521, Rollinson could not get enough information to decide everything that had to be done (R. 389, 390, 413). However, he was able to see some warped rafters, so he advised his supervisor and Ellerbee Brothers was hired (R. 172, 286, 287).

Thereafter, a rolling scaffold was erected so that Rollinson could get right up at the inside top of the tank's roof and reach up and check the rafters, crown, and circle girder or beam (R. 287-289). These were about two feet above his head while he was on the rolling scaffold (R. 288). He had a flashlight and calipers with him on the scaffold and was up there alone (R. 189, 218, 295, 296, 317, 318). Rollinson directed where the rolling scaffold was to be moved so he could inspect the various points he wanted to inspect of the inside top of the tank and the inner roof supports (R. 189).

In this inspection, Rollinson found bent, warped rafters (R. 286, 392). These were not in the area where the roof collapsed (R. 190, 191). He found that the girders were all right and that no replacements would be necessary on the center circle ring beam or girder (R. 291, 315). He did not check every place for needed repairs, or replacement of bolts, he only "spot-checked" (R. 392, 395). His primary attention was to those areas of the roof that had buckles and sways in them and the rafters (R. 414). The buckles in the roof were on the outer perimeter of the tank (R. 446, 447), while the circle beam or girder where the collapse occurred is in the middle of the tank (R. 387, 388).

As a result of this second, close-up inspection of the upper inside top of tank 521, Rollinson found some badly corroded nuts and bolts (R. 392, 399). This condition was just here and there (R. 290). However, the only place he specifically named where he did find bad bolts was where the rafters tied into the outer shell of the tank (R. 289, 416), while the circle beam or girder is in the middle of the tank's supports (R. 387, 388). Following this close-up inspection, Rollinson either made no statement at all to Ellerbee Brothers personnel about the condition of whatever nuts and bolts he may have observed (R. 217, 218, 270, 397, 448, 449), or only advised them that some, unspecified bolts might have to be replaced as the work progressed (R. 398, 448, 449). After defendant's second, close-up inspection, work by Ellerbee Brothers personnel began with the removal of the roof in plates (R. 188, 436).

The contract between defendant and Ellerbee Brothers, plaintiffs' employer, did not call for either complete, general repairs or specific repairs. Instead it provided for defendant to direct what repairs as were necessary (R. 27; Def. Ex. No. 1, R. 453), and that was the purpose of Rollinson's inspections of the tank (R. 13, 25, 163, 164, 290).

As plaintiffs were working on August 5, 1968, the center circle ring beam or girder and the floor-to-roof column to which it was connected were beneath them and the roof and could not be seen (R. 118, 230, 445).

Ordinarily, the points on a storage tank roof directly over these floor-to-roof columns would be considered the safest places to be on the roof because of the support (R. 192, 193, 449, 450), and that would apply to tank 521 as well as to any other tank (R. 450). However, it was at one such point, directly over one of these columns that the roof on this tank collapsed (R. 200, 201, 204), following Rollinson's second, close-up inspection of the upper roof supports of this tank (R. 188, 246).

Following plaintiffs' fall, another examination of the inside of the tank by defendant's superintendent of safety revealed that many of the nuts on the bolts in the rafters and in the circular girders supporting the rafters were corroded away (R. 172).

Suit was filed in the United States District Court in Beaumont, Texas, contending that the occurrence in question and plaintiffs' injuries were caused by defendant's negligence. Texas Employers' Insurance Association intervened

to recover payments made to plaintiffs and medical expenses paid under the Workmen's Compensation Law of Texas.

The trial of the case was to a jury. During the course of the trial, failed to make or renew a motion for directed verdict at the close of all the evidence (R. 485).

Following the presentation of the evidence, the jury found that defendant was negligent, first, in failing to provide plaintiffs with a reasonably safe place in which to work, and, second, in failing to adequately inspect the storage tank in question for dangerous conditions which were known, or should have been known in the exercise of ordinary care, to the defendant, and which were not open and obvious to plaintiffs or their employer. The jury also found that defendant's negligence was a proximate cause of plaintiffs' fall and their injuries. Finally, the jury awarded the plaintiff, Drew Cherry, $10,000 in damages, and the plaintiff, Forrest Mullican, $150,000 in damages (R. 527).

The jury initially answered "Yes" to defendant's issue, that plaintiffs' injuries arose from or were intimately connected with defects in the premises which plaintiffs' employer had undertaken to repair (R. 516). The trial court considered that this initial finding was in conflict with the remainder of the verdict and the Court's instructions, particularly the awarding of damages. The trial court gave the jury additional instructions and the jury again retired (R. 516-518, 524). Following further deliberation, the jury returned their final verdict with the defendant's issue answered "No" and the remainder of their original answers unchanged (R. 527).

Judgment was entered for the plaintiffs on the jury's final verdict. The Court of Appeals for the Fifth Circuit affirmed that judgment.

ARGUMENT

REPLY TO DEFENDANT'S FIRST QUESTION PRESENTED FOR REVIEW

THE ACTION OF THE TRIAL IN REFUSING THE JURY'S INITIAL CONFLICTING FINDINGS AND RETURNING THEM FOR FURTHER DELIBERATION DID NOT DEPRIVE DEFENDANTS OF TRIAL BY JURY UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The one defensive issue submitted to the jury was issue No. 3, inquiring:

> "Do you find from a preponderance of the evidence that the plaintiffs' injuries arose from or were intimately connected with defects in the premises which their employer, Ellerbee Brothers, Inc. had undertaken to repair?"

This is the only defense relied on by defendant. And, in the first sentence of its argument under question number one, at p. 4 of its petition, defendant makes the statement that this issue was founded on the "well settled" law in Texas that an owner or occupier of premises has no duty to employers of an independent contractor regarding defects in the premises which the contractor has undertaken to repaid. Defendant is in substantial error on this significant point.

In fact, the Texas Supreme Court has *never* applied such an exception to the positive duties owed by the owner or

occupier of premises to its invitees, including employees of contractors such as plaintiffs herein.

This manifest error is exposed by the fact that the only case defendant cites for the proposition stated is *City of Beaumont v. Graham*, 441 S.W. 2d 829 (Tex. Sup. 1969). In the *Graham* case, the plaintiffs prevailed in the Texas Supreme Court against contentions similar to those advanced by defendant here and despite a jury finding that:

> "* * * at the time of the accident, Graham 'was performing work that was intimately connected with the work contracted to be performed by (Graham's employer)'* * *" 441 S.W. 2d at p. 835.

In the *Graham* case the Texas Supreme Court did *not* apply the exception relied on by defendant (411 S.W. 2d at pp. 834, 835) and has *never* applied it to deny recovery to employees of contractors such as plaintiffs in this case. Yet, this was the only issue submitted as a defense to the jury.

Under the trial court's instructions (Appendix B), issue no. 3 was "defendant's issue", despite its lack of legal effect. The initial instructions of the trial court unequivocally told the jury that they must answer defendant's issue no. 3 "No" in order to reach the question of plaintiff's damages, stating:

> "* * * (if) you find any of these acts or omissions of negligence against the defendant in favor of the plaintiffs and *you furthermore find that the work which the plaintiffs' injuries arose from were not intimately connected with the defect in the premises which their employer, Ellerbee Brothers had undertaken to repair,*

then you will find in favor of the plaintiffs and give your attention to the issues of damages." (Emphasis Added).

At p. 11 of its petition, defendant attempts to brand as a "misstatement of the record" the correct conclusion of the Court of Appeals that the above instruction explicitly charged the jury not to reach the issue of damages if they found plaintiffs' injuries arose from work intimately connected with the defect the workmen were employed to remedy. *Cherry v. Atlantic-Richfield Co.*, 456 F. 2d 1310 (5th Cir., 1972). Defendant's characterization of the Fifth Circuit's statement is achieved by the simple expedient of ignoring the above-quoted instruction to which the Fifth Circuit referred, and quoting another portion of the trial court's instructions. Petition at p. 11.

This clutching at straws by defendant is further exemplified by the "headnote" quotations made at p. 9 of its petition, rather than using the actual language employed by the courts in the cases there cited.

Likewise, plaintiffs submit that the rule defendant seeks to impose here, regarding analysis and attempted reconciliation of conflicts in jury's verdicts, is simply not intended for cases such as this one. The rule, stated by this Court in *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355 (1962) at p. 364, is one intended to prevent appellate redetermination of facts found by the jury and the upsetting of valid judgments based on jury findings under the guise of hypertechnical, strained "conflicts". 369 U.S. at

pp. 358, 359. That rule does not apply to this case involving a real, irreconcilable conflict.

Defendant here is not in the position of trying to protect a judgment against a claim that the jury's verdict contains a conflict and will not support the judgment entered. Instead, defendant is urging this Court to reexamine and redetermine the facts and hold that the jury's final verdict is unavailing. The action sought by defendant is not consonant with the provisions of the Seventh Amendment.

Defendant also seeks to fragment the trial court's charge and avoid the rule that a special verdict must be construed in light of the surrounding circumstances, including the instructions of the court. *McVey v. Phillips Petroleum Co.*, 288 F. 2d 53 (5th Cir., 1961) at p. 59; *Wright v. Kroeger Corp.*, 422 F. 2d 176 (5th Cir., 1970) at p. 178; 9 Wright and Miller, *Federal Practice and Procedure* (1971) Sec. 2510 at p. 516.

As noted above, the trial court explicitly instructed the jury that they had to answer defendant's "intimately connected" issue, no. 3 "No" before reaching and awarding damages in issue no. 4. In addition, as shown in Appendix B, the trial court also instructed the jury that they "must consider the charge as a whole"; that issue no. 3 was the "issue of the defendant"; that if the jury answered issue no. 3 "Yes", this would indicate that they "find in favor of the defendant and against the plaintiffs"; and that defendant "is liable to plaintiffs herein, if and only if" and then outlining

conditions paralleling issues nos. 1(a), (b), and (c), and Section 343, Restatement of Torts.

Obviously then, the initial "Yes" answer by the jury to issue no. 3 conflicted directly and irreconcilably with the award of damages in answer to issue no. 4 and the court's instructions with reference thereto.

> "* * * a special verdict must be construed in light of the surrounding circumstances, including the instructions of the court * * *.
>
> "* * * The jury must have been confused. Had it thought that its answer to Question No. 3 provided a complete defense, as defendant suggests, it would not have awarded plaintiff * * * damages in Question No. 4. It thus appears that the jury's findings are irreconcilable." *Wright v. Kroeger Corp.*, cited above, 422 F. 2d at p. 178.

See also: *Nordmann v. National Hotel Co.*, 425 F. 2d 1103 (5th Cir., 1970) at pp. 1105, 1106; *Martin v. Gulf States Utilities Co.*, 344 F. 2d 34 (5th Cir., 1965) at p. 37; *Alston v. West*, 340 F. 2d 856 (7th Cir., 1965) at pp. 857, 858; 9 Wright and Miller, cited above, Sec. 2510 at pp. 517, 518.

Upon determining the presence of this irreconcilable conflict in the jury's initial findings, the trial court advised the jury of the conflict. Then, the court further instructed them to return to their deliberations and resolve the conflict, either by deleting the damages awarded in answer to no. 4, or by changing their answers to nos. 1(a), or (b), or by changing their answer to defendant's issue no. 3. The jury chose the latter as representing their true and final verdict

on the evidence and plaintiffs submit that response was correct.

Rule 49(a), Federal Rules of Civil Procedure, places no limitation on the trial court's discretion in the event of a conflict in the jury's answers. Since the facts are to be found by the jury, it seems not only logical, but practical to permit the jury to continue their deliberations and resolve their own conflict. The alternatives, engendering a new trial, with a new jury, with additional time and expense, are apparently what defendant seeks here. The action of the trial court and the jury, leading to the jury's resolution of its own conflicting findings, clearly did not violate defendant's Seventh Amendment rights. Plaintiffs submit that defendant's position is simply without foundation.

In *Nordmann v. National Hotel Co.*, cited above, the jury was asked the following questions, among others:

> "1. Was the Jung Hotel, through its employees, agents and/or representatives negligent? * * *
>
> "2. If so, was this negligence a proximate cause of the injuries sustained by the plaintiffs? * * *
>
> "3. Was the plaintiff, Mrs. Mary LeBlanc Nordmann, guilty of contributory negligence? * * *
>
> * * * * *
>
> "6. What is the total amount of damages to which the plaintiff, Mrs. Mary LeBlanc Nordmann, is entitled to recover? * * *
>
> "7. Was the plaintiff, Ervin A. Nordmann, guilty of contributory negligence? * * *
>
> * * * * *
>
> 10. What is the total amount of damages to which the plaintiff, Ervin A. Nordmann, is entitled to recover? * * *" 425 F. 2d at p. 1105.

The jury first returned a verdict with No. 1 answered "*No*", No. 2 unanswered, No. 3 answered "No", and No. 7 answered "No". *In addition, however, the jury had found damages of $16,000 in answer to No. 6 and $5,000 in answer to No. 10.* At p. 1106.

The trial court considered these findings to constitute a conflict and, as here, he advised the jury of the verdict's inconsistency and sent them back to reconsider it. The jury then returned their final verdict, answering No. 1 "Yes", No. 2 "Yes", and leaving their findings of no contributory negligence (Nos. 3 and 7) and damages (Nos. 6 and 10) unchanged. At p. 1105. As a result, judgment for the plaintiffs was entered. The Fifth Circuit Court of Appeals affirmed the case, treating the damages issues as "in effect" the general verdict. 425 F. 2d at p. 1106.

The Court of Appeals noted that in the *Nordmann* case, as in this case:

> "* * * The positive answers of the jurors when individually polled leave no doubt as to their intention or genuine verdict." 425 F. 2d at p. 1106.

In *Alston v. West*, cited above, 340 F. 2d 856, the Seventh Circuit Court of Appeals approved the trial court's action in refusing an initial conflicting verdict, and resubmitting the case to the jury.

> "* * * We think the trial court properly refused to accept the first verdict which was *directly contrary to the instructions which had been given. Furthermore, the court properly exercised its discretion in resubmitting the case to the jury.*" 340 F. 2d at p. 858. (Emphasis Added).

In *Truitt v. Travelers Ins. Co.*, 175 F. Supp. 67 (S.D., Tex., 1959), a workmen's compensation case, the jury was given a special verdict charge and retired for deliberation. Then:

> "* * * The jury requested that the charge on total and partial incapacity be re-read after it had deliberated for a time. *After having the charge re-read to them, the jury retired. It later returned with an inconsistent verdict* in which it held that total and partial incapacity had begun on the same date. *The court pointed out these consistent findings to the jury*, instructing them that total and partial incapacity cannot exist at the same time, but not re-reading the charge * * *. *When the jury returned again*, its foreman posed the following question: 'Your honor, it is the jury's intent to pay the plaintiff 301 weeks, $25 at 301 weeks. Now we are confused as to how to word that.' * * * *" 175 F. Supp. at p. 73. (Emphasis Added).

Following some additional discussion with the jury:

> "* * * *The court then instructed the jury concerning the way in which the special interrogatories should be answered in order to achieve the result* of finding total incapacity for 301 weeks and of finding no partial incapacity. *If its intention was as expressed, the court ordered the jury to withdraw and fill in the blanks as instructed* * * *." At p. 73. (Emphasis Added).

The trial court noted:

> "* * * *The tendency of a jury to consider broadly the rights and liabilities of the parties cannot be eliminated, even in special verdict practice* * * *. *These supplementary instructions were given within the discretionary power of the court to assist the jury in expressing its findings* * * *." At p. 73. (Emphasis Added).

The Fifth Circuit Court of Appeals affirmed the *Truitt* case and held the trial court's actions in resubmitting the special verdict to the jury with the stated instructions was proper. *Travelers Ins. Co. v. Truitt*, 280 F. 2d 784 (5th Cir., 1960) at p. 790. See also: 9 Wright and Miller, cited above, Sec. 2510 at pp. 517, 518; Lipscomb, *Special Verdicts Under the Federal Rules*, 25 Wash. Law Q. 185 (1940) at p. 212.

In addition, the jury themselves set aside and resolved their initial conflicting verdict and the second, final verdict is the only legal verdict in this case. See, e.g., *McCarthy v. Morrison*, 468 S.W. 2d 350 (Tex. Sup. 1971) at p. 351.

Accordingly, even without giving consideration to the absence of legal effect or the limited legal effect an unchanged affirmative answer to issue no. 3 would have had for defendant, discussed in detail in reply to defendant's question number two, plaintiffs respectfully submit that defendant's claim of error in its question number one to this Court is unfounded and does not form any basis for review here of the trial court's judgment for them as affirmed by the Court of Appeals.

REPLY TO DEFENDANT'S SECOND QUESTION PRESENTED FOR REVIEW

THE EVIDENCE IN THE TRIAL COURT DID NOT ESTABLISH AS A MATTER OF LAW THAT DEFENDANT OWED NO DUTY TO THE PLAINTIFFS AND THE JURY PROPERLY FOUND THAT DEFENDANT NEGLIGENTLY BREACHED ITS DUTIES TO PLAINTIFFS, CAUSING THEIR FALL AND INJURIES.

At no point in its petition has defendant advised this Court that it did not move for a directed verdict at the close of all the evidence in the trial court. See Appendix A.

Defendant thereby waived a previous, unspecified "motion" made prior to the presentation of its case and foreclosed its right of judgment notwithstanding the evidence. Rule 50, Federal Rules of Civil Procedure; 5A Moore, *Federal Practice* (2d Ed., 1971), Para 50.05 at pp. 2341, 2342; *Hernandez v. Employers Mut. Liab. Ins. Co.*, 346 F. 2d 154 (5th Cir., 1965) at p. 155; *Bayamon Thom McAn Inc. v. Miranda*, 409 F. 2d 968 (5th Cir., 1969) at p. 971; *Indamer Corp. v. Crandon*, 217 F. 2d 391 (5th Cir., 1954) at p. 393.

The failure of defendant to move for a directed verdict at the close of all the evidence has another ramification.

> "From the beginning of the Federal Rules of Civil Procedure, the courts have been consistent in holding that the appellate court cannot review the sufficiency of the evidence in the absence of an unwaived motion for a directed verdict * * *." 5A Moore, cited above, Para. 50.05 at p. 2343, and cases cited in footnote 7 at pp. 2343-2345.

See also: *Pruett v. Marshall*, 283 F. 2d 436 (5th Cir., 1960) at p. 438; *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F. 2d 129 (5th Cir., 1965) at p. 132; *Hommel v. Jackson-Atlantic, Inc.*, 438 F. 2d 307 (5th Cir., 1971) at p. 309.

Because defendant failed to properly or adequately challenge the legal sufficiency of the evidence on which the jury's verdict and trial court's judgment are founded, it could not do so before the Court of Appeals and cannot do so here.

> *"* * * the entire argument, addressed as it is to the absence of a duty toward appellee which would support the issues of negligence, is in fact an argument on the*

*insufficiency of the evidence to sustain the verdict, and that, because, no motion having been made for a directed verdict, the specification under settled law presents nothing for our consideration * * *." Fort Worth & Denver Ry. Co. v. Thompson,* 216 F. 2d 790 (5th Cir., 1954) at pp. 792, 793. (Emphasis Added).

See also: Amendment VII, U. S. Constitution; *Whitman v. Pitrie,* 220 F. 2d 914 (5th Cir., 1955) at p. 918; *Seaboard Air Line R. Co. v. Horowitz,* 277 F. 2d 738 (5th Cir., 1960); *Pruett v. Marshall,* cited above, 283 F. 2d at p. 438.

Defendant's complete absence of candor in failing to disclose this meaningful procedural element is complemented by its erroneous characterizations of the state of the evidence in this case and the state of the law of premises liability in Texas.

For example, at p. 13 of its petition defendant seeks to off-handedly and derogatorily describe as the plaintiffs' "only evidence" regarding the cause of the collapse of the roof on defendant's storage tank, a damaging series of uncontradicted admissions against interest by defendant's own superintendent of safety in his official report of this incident. Appendix C.

For further example, defendant erroneously describes the testimony of its witness, Parker, on what work was to be performed by plaintiffs' employer as "undisputed". On the contrary, Parker's testimony, a portion of which defendant has included as Appendix VI to its petition, was disputed on every hand — by the contract between defendant and plaintiffs' employer, by the defendant's answers to inter-

rogatories submitted by plaintiffs, by testimony presented on behalf of plaintiffs, and by defendant's own witnesses. These matters are set forth in Appendix C hereto.

Probably at the root of all this however is defendant's continuing reliance on a "matter of law", an "exception" to the doctrine of premises liability, which defendant mistakenly believes to be applicable in Texas and applicable to this case. Defendant is wrong on both points.

In its argument, defendant erroneously seeks to limit the duties owned by the owner or occupier of premises to employees of contractors to simply warning of hidden or inherent dangers. Petition at p. 14.

Actually, the Texas Courts state the owner or occupier's duties so that the passive duty of warning is secondary to the active duties of reasonably inspecting, discovering dangerous conditions, and correcting them.

> "* * * the occupier of land or premises is required to keep his land or premises in a reasonably safe condition for his invitees. *This includes a duty of the occupier to inspect and to discover dangerous conditions.* Smith v. Henger, 148 Tex. 456, 226 S.W. 2d 425, 20 A.L.R. 2d 853 (1950); Genell, Inc. v. Flynn, Tex. 358 S.W. 2d 543 (1962). His duty is to protect his invitees from dangers of which he, the occupier, knows, or (because of duty to inspect) of which he *should* know in the exercise of ordinary care. *If there are dangers which are not open and obvious, he is under a duty to take such precautions as a reasonably prudent person would take to protect his invitees therefrom or to warn them thereof* * * *." *Halepeska v. Callihan Interests, Inc.*, 371 S.W. 2d 368 (Tex. Sup. 1963) at p. 378 (Court's and Added Emphasis).

> "The law places upon the owner or occupant of land the duty to use reasonable care to *make and keep* the premises safe for the use of * * * the employees of contractors performing construction or other work on the premises * * *" *Smith v. Henger*, 226 S.W. 2d 425 (Tex. Sup., 1950) at p. 431. (Emphasis Added).

See also: Restatement of Torts 2d, Sec. 343, and especially subsection (c) and comment b, at p. 216.

Defendant's reliance is mistakenly placed on *City of Beaumont v. Graham*, cited above. As previously pointed out in reply to question number one, the *Graham* case was won by the plaintiffs in the Texas Supreme Court and defendant's "exception" was not applied. Further, the Texas Supreme Court refuted defendant's attempt to stress only the secondary, passive warning aspect of the owner or occupiers' duties to contractor employees by emphasizing the duty of *elimination* of unreasonably dangerous conditions. 441 S.W. 2d at p. 834.

Defendant also quotes a portion of an American Law Reports, Second Series, annotation as the foundation of its argument for its hoped-for "exception". Petition at pp. 14, 15. However, defendant stops its quotation short of the explanation of the basis for this "exception", which exposes its inapplicability to this case — it is founded on the premise that instead of the owner or occupier doing so, the contractor will inspect, find out what is wrong, and warn his own employees. 31 A.L.R. 2d 1375, at pp. 1382, 1383.

That is not the law of Texas. *Halepeska*, cited above; *Smith*, cited above; *Graham*, cited above. And, as much as

defendant wants to win this case, it cannot cite or quote one Texas case actually holding as it wants this Court to hold.

The obvious reason no Texas case has applied defendant's "exception" is that in Texas the active duties of inspection, discovery, and correction of hidden defects are imposed on the owner or occupier, not on the contractor. See cases cited and quoted above.

Defendant also relies heavily on a Missouri case, *Hammond v. City of El Dorado Springs*, 242 S.W. 2d 479 (Mo. Sup. 1951). However, that case shows clearly that Missouri rule is not consistent with Texas law. There the active duties of inspection and repairs were placed on the contractor, not the owner or occupier. 242 S.W. 2d at pp. 482, 483. Indeed, in a case such as this one, in which the duty to reasonably inspect was on the defendant, the Missouri Supreme Court readily distinguished the *Hammond* case as:

> "* * * so different from the one before us that it should be obvious the case has no application here." *Kiger v. Terminal R. Ass'n of St. Louis*, 311 S.W. 2d 5 (Mo. Sup., 1958) at p. 9.

Here, realizing it had the duty of inspection under Texas law, defendant undertook not one but two inspections of storage tank 521 prior to plaintiffs' employer beginning work. These were made by its only full-time inspector, Rollinson.

Therefore, plaintiffs were entitled to assume defendant had discharged its duty to use reasonable care to prevent injury from hidden dangers. *Smith*, cited above, 226 S.W. 2d at p. 434.

However, defendant negligently failed to satisfy its clear duties to reasonably inspect, to discover hidden dangerous conditions, and provide plaintiffs a reasonably safe place in which to work. The jury so found.

As pointed out in Appendix C hereto, the evidence herein shows:

1. As to the scope of the work to be performed by plaintiffs' employer, the contract involved in this case did not call for complete, general, or specific repairs, but provides only that plaintiffs' employer:

> "Furnish supervision, labor, transportation, tools, equipment and material to remove door sheets and make necessary repairs *as directed* to our 521 tank." (Emphasis Added).

2. Defendant was to determine what repairs were "necessary" through inspections by its inspector, Rollinson.

3. Defendant would "direct" what repairs were to be made by plaintiffs' employer.

4. The initial, motivating factor to repair tank 521 arose from its roof buckling due to bent and warped rafters, not located in the vicinity of the roof's collapse by which plaintiffs were injured.

5. The roof's collapse was due to the failure of the center ring girder (not a rafter) where it connected to a floor-to-roof column, near the middle of the tank.

6. As admitted by defendant's safety director, in his official report of this incident, the roof's collapse occurred when:

> "* * * *Suddenly the center ring girder just above one of the tank columns came loose where it was bolted together* by bolts through a short section of the plate. The circular girder was an *inner support* for the roof rafters which were supporting the plates the men were standing on * * *." (Emphasis Added).

7. As a result of his two inspections of the inner supports of this storage tank, defendant's inspector Rollinson could only specifically locate "bad bolts" for replacement on the outer shell of the tank and made no specific mention of "bad bolts" at the middle of the tank where the failure occurred.

8. As a result of his two inspections, one of which was on a rolling scaffold which put him within two feet of the inside of the tank's 42-foot ceiling, defendant's inspector Rollinson contemplated no repairs to the girder that failed, to any of the girders in the tank, or to the column at which the failure occurred.

9. Despite the generalities in that portion of his testimony quoted in Appendix VI to defendant's petition, defendant's witness, Parker, admitted he thought the floor-to-roof columns were in reasonably good shape.

10. Defendant's witness, Parker admitted that the point where the roof of tank 521 collapsed, over the center ring girder and a floor-to-roof column should have been the safest place on the roof of the tank.

11. Defendant's witness, Parker, admitted that had he known of this tank roof was going to collapse as a result of the failure of one of its structural supports, he would never have allowed plaintiffs to go on the roof.

Obviously then, the testimony quoted by defendant in its Appendix VI was not the "only testimony" on the nature of the work to be done by plaintiffs' employer nor was it "undisputed". Defendant's claims for Parker's testimony are erroneous. Petition at p. 13, 15-17.

On the basis of Rollinson's testimony, noted above, Parker's information as to the status of the tank and the work to be performed did not pertain to any repairs or replacements on the center ring girder which failed, or to the tank column where the failure occurred. So, there had been no undertaking by plaintiffs' employer to repair the defect which gave rise to the roof's collapse and none was anticipated under the contract involved.

At no point in his testimony did Rollinson mention any anticipated repairs to the floor-to-roof columns even though he had checked this. Defendant's witness Parker admitted that he thought these roof supports were in reasonably good shape even after talking with Rollinson.

In other words, the evidence from defendant's own witnesses demonstrates that it was not until after the center ring girder gave way and plaintiffs fell that anyone expected that it would be necessary to make "repairs as directed" to that girder where it connected to the tank column. But it was defendant's duty, under the Texas law from which it

seeks to escape, to discover by adequate inspection the dangerous condition involved here and take action. Defendant's "exception" does not apply to this case.

An additional factor exists in this case which demonstrates the inapplicability of defendant's "exception". The *Graham* case states that the contract involved is of "controlling importance" in determining whether a case falls within the "exception". 441 S.W. 2d at p. 834. Yet defendant has completely failed to apprise this Court of the contract involved here.

As noted above, the contract in this case called for neither general nor specific repairs to tank 521. Instead, plaintiffs' employer was to be "directed" by defendant as to what repairs would be necessary and no repairs had been "directed" as to the girder that failed or the column at which point the failure occurred.

In the *Graham* case, the Texas Supreme Court stated:

> "* * * *Assuming that we would apply the exception, quoted above, to risks only intimately connected with defects* which the contractor *has* undertaken to repair, as there stated, that obviously was not what the jury found * * *. The finding is of an undisputed fact. *The work being performed — sandblasting and painting — was expressly required by the contract. In the absence of a contractual provision for complete general repairs as in Hammond, supra, or requiring Texas Tower to replace the bracket assemblies* (which pulled loose causing Graham's fall) *we are unwilling to hold, as a matter of law, that the contract required Texas Tower to replace such assemblies and to repair the corroded tank wall beneath such assemblies.*" 441 S.W. 2d at p. 835. (Court's and Added Emphasis).

The contract in *Graham* did not provide expressly for replacement of the bracket assemblies, but did call for the replacement of the "spider rods" *held in place by the bracket assemblies*. Still, the Court refused to apply the "exception" relied on by defendant here. And, the Court did not make a direct statement as to whether it would apply the "exception" in any case.

At the time the plaintiffs' fall, their employer had not undertaken repair of any defect in the center ring girder or the tank column to which it connected. Plaintiffs' employer had not been "directed" to any "necessary repairs" to that portion of tank 521, and that is all that the contract in this case provided for.

The close-up, but inadequate second inspection by defendant's inspector, Rollinson, had failed to provide the information it should have. He failed to put himself in a position whereby defendant could either eliminate the dangerous condition, warn of the dangerous condition, or "direct" plaintiffs' employer concerning the defect found later. Instead, it was not until the *third* inspection, by defendant's superintendent of safety, Britt, and *after* plaintiffs' fall, that defendant finally discovered the defect which caused the roof's collapse—which Rollinson had been within two feet of.

At the time of the roof's collapse, plaintiffs were removing roof plates and no work had commenced on the supporting structures beneath the roof. That factor distinguishes this case from the comment in the other Texas case cited by

defendant, *Wood v. Kane Boiler Works*, 238 S.W. 2d 172 (Tex. Sup. 1951), where the Texas Court again did not apply defendant's "exception", noting it was limited in other states to those cases in which the contractor is to "*inspect and repair*" (Court's Emphasis) or in which the contractor is to "repair" and:

> "* * * the injury was caused by the *very condition* which the plaintiff was employed to correct *and was in the act of correcting when injured* * * *." (Citing a New Jersey case). 238 S.W. 2d at p. 176. (Emphasis Added).

Neither situation exists here. The only "exception" defendant has urged to its duties to plaintiffs still does not apply.

Defendant was under a continuing duty to provide plaintiffs a reasonably safe place in which to work. *Smith*, cited above, 226 S.W. 2d at p. 431. The jury properly found that defendant had negligently failed to satisfy that duty, proximately causing plaintiffs' fall and injuries.

Defendant was under a duty to reasonably inspect its premises and discover the unreasonably dangerous condition involved here. *Halepeska*, cited above, 371 S.W. 2d at p. 378; *Smith*, cited above, 226 S.W. 2d at p. 431. The jury properly found that defendant also failed to satisfy that duty, proximately causing plaintiffs' fall and injuries.

Plaintiffs submit that at the least, there was a conflict in the substantial evidence on these matters which was properly resolved in plaintiffs' favor and that the trial court's judgment for them, affirmed by the Court of Appeals, should

not be disturbed. *Boeing Co. v. Shipman*, 411 F. 2d 365 (5th Cir., 1969) at pp. 374, 375, 377.

The "matter of law" defendant urges in its efforts to avoid liability is not the law of Texas or the law of this type of case. Plaintiffs submit that defendant has failed to demonstrate a reason for this Court to review the judgment herein.

REPLY TO DEFENDANT'S THIRD QUESTION PRESENTED FOR REVIEW

THE DEFENDANT WAS NOT ENTITLED TO A JUDGMENT SIMPLY BECAUSE THE JURY DID NOT FIND IT FAILED TO WARN PLAINTIFFS OR THEIR EMPLOYER OF DEFECTS IN THE PREMISES.

Defendant attempts to turn the absence of a jury finding of "Yes" to issue no. 1(c), the "warning" issue (defendant's Appendix IV) into a positive finding that defendant in fact made a warning. Its efforts are unavailing.

The overall evidence in this case indicates that no warning, and certainly no legally effective warning, was ever given by defendant's inspector, Rollinson, or anyone else at defendant's plant, to plaintiffs or anyone with their employer.

It is true the jury did not find that defendant had failed to warn plaintiffs in this case. But, the "No" answer to the "warning" issue, no 1(c), certainly does not have the effect defendant seeks to attach to it. It does not constitute a finding that the defendant had not failed to warn, it merely means the jury did not make a finding that defendant did so fail and does not form the basis for any judgment for defendant in this case. *Graham*, cited above, 441 S.W. 2d at

p. 835; *C. & R. Transport, Inc. v. Campbell*, 406 S.W. 2d 191 (Tex. Sup., 1966) at p. 194.

Under the circumstances evidence herein should be viewed:

> "* * * in the light and with all reasonable inferences most favorable to the (plaintiffs) * * * *" Boeing Co v. Shipman*, cited above, 411 F. 2d at p. 374.

However, viewing the evidence in *any* light it is obvious that the inadequacy of Rollinson's inspections failed to put defendant in the position, where it *should* have been, so it *could* have corrected or warned of the danger which gave rise to the occurrence in question and plaintiffs' injuries.

Also, the answer to no. 1(c) was not necessary to sustain plaintiffs' cause of action herein despite defendant's erroneous assertions in its petition Defendant has mis-read or mis-interpreted Section 343 of the original Restatement of Torts, although it is quoted fully at p. 18 of defendant's petition.

Under Section 343, defendant's duty to warn is both disjunctive and secondary to the defendant's duty to "*make the condition reasonably safe*". (Emphasis Added). The emphasis on active measures as opposed to passive measures, such as merely warning, is underscored in the current Section 343, Restatement of Torts, 2d. See especially subsection (c) and comment b, at p. 216.

The jury properly found that defendant negligently failed to meet its primary duty to make the condition reasonably safe.

The jury further found that defendant, having undertaken inspections, negligently failed to meet its duty to ade-

quately inspect. Therefore defendant continued to violate its duties to plaintiffs and negligently prevented the place in which they were working from being made reasonably safe and forestalled any warning or knowledge of the specific danger involved.

> "* * * This includes a *duty* of the occupier to *inspect and to discover dangerous conditions* * * * of which he * * * knows, or (*because of his duty to inspect*) of which he *should* know in the exercise of ordinary care. If there are dangers which are not open and obvious, he is under a *duty to take such precautions as a reasonably prudent person would take to protect his invitees therefrom* * * *." *Halepeska*, cited above, 371 S.W. 2d at p. 378 (Court's and Added Emphasis).

Under the Texas law as it applies to the facts of this case, defendant is liable notwithstanding the state of the "warning" issue. *Halepeska*, cited above, 371 S.W. 2d at p. 378; *Smith*, cited above, 226 S.W. 2d at p. 431; *Graham*, cited above, 441 S.W. 2d at p. 835.

Despite the absence of any effective warning in this case and the demonstration in the evidence that the inadequacy of Rollinson's inspection prevented any warning, defendant cites and quotes at length from two "warning" cases in its petition at pp. 17-19.

In both the cases defendant relies on, *Gulf Oil Corp. v. Bivins*, 276 F. 2d 753 (5th Cir., 1960), *cert. denied* 364 U.S. 835, and *Delhi-Taylor Oil Corp. v. Henry*, 416 S.W. 2d 390 (Tex. Sup. 1967), there was an adequate warning given to plaintiffs employer or supervisor. See 276 F. 2d at pp. 757-759; 416 S.W. 2d at pp. 392, 393. No such warning was given in this case.

Further, defendant persists in ignoring that the critical factor present in both *Bivins* and *Delhi-Taylor* was that *the warnings given in those cases, and found to be adequate, were of the precise, occurrence-creating danger and had the effect* "to enable (the invitees) to avoid the harm". *Bivins*, cited above, 276 F. 2d at pp. 755, 757; *Delhi-Taylor*, cited above, 416 S.W. 2d at pp. 392, 393. That factor is clearly not present in this case.

Plaintiffs submit that those cases do not fit the facts of this case and do not control its outcome.

Defendant continues under its question number three, to assert, without foundation or any reference to the record herein, that "even if no warnnig has been made at all, there would be no liability". Petition at p. 19. This amazing conclusion springs from defendant's mistaken assertion that one unreferenced sentence in *Bivins* concerning the "knowledge of the danger" by the contractor somehow applies to this case to relieve it of liability. It does not.

The jury was charged on "open and obvious" and its findings on that aspect of this case were favorable to plaintiffs.

Reference is made to the testimony of plaintiffs' witnesses, Harvey and Cherry, and defendant's witnesses, Rollinson and Parker, noted above under reply to question number two, graphically illustrating the absence of knowledge and appreciation. Appendix C.

During the trial, defendant tried repeatedly to inject some general "knowledge", about some abstract "danger", involved in work on storage tanks in general, and the "possibility" of a roof collapse. But when we get to *this* tank and *this* danger, it is submitted that the record is devoid of any evidence tending to satisfy the necessary Texas requirement that:

> "* * * knowledge of the defect is *not enough. There must be knowledge of the danger involved and the appreciation of the danger involved.* * * * knowledge and appreciation of the *particular danger involved* * * * *" Ellis v. Moore*, 401 S.W. 2d 789 (Tex. Sup., 1966) at p. 793. (Emphasis Added).

This tank roof collapsed at a point over one of the floor-to-roof columns when the circle ring girder gave way. The testimony is uncontradicted that such a point, over these supports, on the roof of storage tanks in general and tank 521 in particular should have been the safest place on the entire roof. This was admitted by defendant's witness, Parker. Appendix C.

Therefore, defendant's own witnesses have refuted its unfounded assertions concerning "knowledge of the danger".

The jury and the trial court decided that defendant had negligently failed to satisfy its primary duties to the plaintiffs. The Court of Appeals has affirmed. Plaintiffs submit that no basis has been demonstrated by defendant for disturbing the judgment for plaintiffs.

REPLY TO DEFENDANT'S FOURTH QUESTION PRESENTED FOR REVIEW

THE SUMMARY AFFIRMANCE OF THIS CASE BY THE COURT OF APPEALS WAS APPROPRIATE AND DOES NOT CALL FOR THIS COURT'S EXERCISE OF ITS POWER OF SUPERVISION.

Defendant complains of the summary disposition by the Fifth Circuit Court of Appeals of its second and third questions urged here. What defendant has consistently refused to admit, before the Court of Appeals and here, is its failure to move for a directed verdict at the close of all the evidence. Appendix A.

As discussed above in reply to defendant's question number two, this significant failure waives defendant's previous motion, forecloses its right of judgment notwithstanding the verdict, and precludes appellate review of the legal sufficiency of the evidence. See texts and cases cited above.

Yet, before the Court of Appeals, defendant predicated questions urged here on the assertion that the trial court erred in denying its waived "motion for instructed verdict and/or for judgment non obstante veredicto"! It should come as no surprise to defendant that the Court of Appeals discovered its complete lack of candor and determined such points were without merit.

First, as shown in the discussions under the replies to questions numbers one and two herein, the only defense advanced is one never applied by the Supreme Court of Texas and not applicable to the facts of this case anyway.

Second, defendant failed to preserve the procedural basis by which it has attempted to urge trial court error by not timely moving for a directed verdict.

The salutary effects of the Fifth Circuit's Rule 21, permitting the summary disposition of non-meritorious points and points not properly preserved for review are clearly evidenced in this case.

The failure of defendant to preserve the procedural basis of its appeal, including the question of the legal sufficiency of the evidence, and the untenability of its attempt to shoe-horn this case into an inapplicable "exception" thereby indicating that no error of law appears herein, demonstrate that the Fifth Circuit was correct in its summary disposition and affirmance of this case.

Plaintiffs submit that the Fifth Circuit Court of Appeals did not depart from the accepted and usual course of judicial procedures in affirming this case under its Rule 21, and that no occasion exists under this Court's Rule 19 for granting review on writ of certiorari.

CONCLUSION

It is respectfully submitted that no sound reason exists for grant of certiorari in this case, and that the Petition should be, in all things, denied.

Respectfully submitted,

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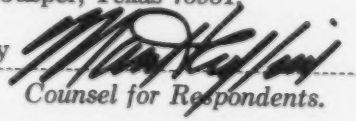
By 

Counsel for Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the United States Supreme Court bar and the counsel of record for the Respondents herein and that, on the 17th day of July, 1972, three (3) copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari were served, pursuant to United States Supreme Court Rule 33, Para. 1, by depositing same in the United States post office, Jasper, Texas, with first class postage prepaid, properly addressed to the post office address of Petitioner's counsel of record, Mr. Jep S. Fuller, Fuller, Fuller & McPherson, 3800 Park Lane, Port Arthur, Texas 77640.

March H. Cofield

APPENDICES

APPENDIX A

ABSENCE OF MOTION FOR DIRECTED VERDICT BY DEFENDANT AT THE CLOSE OF ALL THE EVIDENCE:

"THE COURT: Do you have anything further?

"MR. COFFIELD: No, Your Honor, with that the Plaintiff closes.

"THE COURT: Would you give him a copy of the charge.

"Ladies and Gentlemen, we are now ready to begin the arguments in this case. The evidence has been concluded, and the attorneys will present their summation or argument. The Plaintiff has the right to open and close the arguments. The defendant speaks in the middle. We would suggest about forty-five or fifty minutes to the side. And if you should need a little extra time to conclude the Court, of course, will give it to you.

"REPORTER'S NOTE: Whereupon, at this time, arguments of counsel were heard." (R. 485).

APPENDIX B

JURY CHARGE AND INSTRUCTIONS:

"* * * You are not to single out any one instruction of this charge alone as stating the law, but you must condiser the charge as a whole. * * * (R. 487).

"* * * the Court would charge you that if you find from a preponderance of the evidence that the defendant, the Atlantic-Richfield Company, through its agents, servants, employees or vice principals was negligent in any of the following particulars:

(a) In failing to provide a reasonably safe place for the plaintiffs to perform their work on the storage tank in question;

(b) In failing to adequately inspect the storage tank for dangerous conditions which were known to the defendant or should have been known to the defendant by use of ordinary care and which were not open and obvious to the plaintiffs or their employers;

(c) In failing to warn the plaintiffs of dangerous conditions which were known to the defendant or should have been known to the defendant by the use of ordinary care and which were not obvious to the plaintiffs or their employer which were dangerous to the plaintiffs in the performance of their work.

"And you further find that any one of these acts or omissions of negligence contended for by the plaintiffs was a proximate cause of the injuries and the damages sustained by the plaintiffs, then you would find for the plaintiffs and against the defendant. And you would answer special interrogatory number one "a", "b", and "c", yes, and also the proximate cause issue, special issue number two, yes.

"Now, we turn to the issues of the defendant and the defendant contends that the plaintiffs were injured as

the result of the particular work which their employer, Ellerbee Brothers Incorporated, contracted to do for the defendant. In other words, that the injuries sustained by the plaintiffs arose from or were intimately connected with defects in the premises which their employer, Ellerbee Brothers Incorporated, had undertaken to repair.

"Now, in this connection, the Court would charge you, the owner of premises such as the defendant herein is liable to the plaintiffs herein, if and only if the owner has;

(a) Knowledge or by the exercise of reasonable care should have discovered a condition which if known to it should have realized would have involved an unreasonable risk to them and;

(b) If they had no reason to believe that they would discover the condition or realize the risk involved therein;

(c) Invited or permitted them to enter or remain on the premises without exercising reasonable care to make the conditions reasonably safe or to warn them of such dangerous conditions.

"You are further instructed that adequate warnings to the plaintiffs' employer is to be considered by you as adequate warnings to the plaintiffs. Further, the Court would instruct you in order to find that the conditions of the supporting structures of the storage tank in question were open and obvious, you must find from a preponderance of the evidence that the full extent of the condition with all of its details and surrounding circumstances and the full extent of the dangers thereof was known and fully appreciated by the plaintiffs or their employer, Ellerbee Brothers, Incorporated. Otherwise, the condition is not open and obvious.

"Therefore, the Court would instruct you that if you find from a preponderance of the evidence that the

plaintiffs' injuries arose from or were intimately connected with the defects in the premises which their employer, Ellerbee Brothers, Incorporated, are undertaking to repair, you will answer interrogatory number three yes and find in favor of the defendant and against the plaintiffs.

"Now, if you find from the preponderance of the evidence that the plaintiffs are entitled to recover damages as a result of some act or omission of negligence, you do not have to find all of the acts or omissions of negligence which the Court has charged you as existing, but you merely have to find at least one of the acts or omissions of negligence as the plaintiffs have contended for, that is failure to provide a reasonably safe place to work or in failing to adequately inspect the storage tank or in failing to warn the plaintiffs of dangerous conditions and you find any one of these acts or omissions of negligence against the defendant in favor of the plaintiffs and you further more find that the work which the plaintiffs' injuries arose from were not intimately connected with the defect in the premises which their employer, Ellerbee Brothers, had undertaken to repair, then you will find in favor of the plaintiffs and give your attention to the issue of damages." (R. 493-498).

APPENDIX C

) CONTRACT DATED MAY 8, 1968, BETWEEN TLANTIC-RICHFIELD COMPANY AND ELLERBEE ROTHERS:

"* * * Contractor shall furnish all labor, materials, tools, supervision and equipment necessary to do the work described below, * * *

* * * * *

"Furnish supervision, labor, transportation, tools, equipment and material to remove door sheets and make necessary repairs as directed to our 521 tank." (R. 29; Def. Ex. 1, R. 453).

) DEFENDANT'S ANSWER TO PLAINTIFFS' IN-ERROGATORY NO. 9:

"(9) (a) State whether any inspections of the tank in question were made by any personnel of * * * defendant prior to the time of plaintiffs' fall. If so, as to each such inspection, state (b) the date thereof; (c) the nature thereof; (d) the portion or portions of the tank inspected; (e) the purpose of such inspection; * * *"

ANSWERS BY DEFENDANT:

"INTERROGATORY NO. 9a Yes.

"INTERROGATORY NO. 9b No record was made of the date of such inspection.

"INTERROGATORY NO. 9c Visual inspection and measurement of structural thicknesses.

"INTERROGATORY NO. 9e To determine repairs required." (R. 13, 25, 163).

) TESTIMONY OF DEFENDANT'S INSPECTOR, OLLINSON:

"Q. About how high up in the air did this (rolling scaffold) put you?

"A. Like I say, this tank was forty-two foot, I looked it up on the records before I left, forty-two foot four

inches, that's the outer shell. And that scaffold was up there where I could stand on it. It was just about that far above my head where I could just look and calibrate the rafters.

"Q. About two feet above your head?

"A. I'd say about two foot above my head because they had to roll the scaffold because you have about a two foot slope.

"Q. This put you right up at the top.

"A. Right up at the top where I could read up and check the rafters and the crown and the circle beams on it." (R. 288, 289).

"A. * * * I noticed that we had some bent rafters * * * (R. 280).

"Q. So, it was between the outer circle beam and the shell, is that correct?

"A. That's right." (R. 285).

"* * * I checked the thickness of the rafters and the circle beams and the top of the column and everything, * * * " (R. 296).

"* * * when I made my inspection I found some bad bolts in here (at the outer shell of the tank where rafters are bolted to clips), some of them the nuts was rusted plumb off and different things here and around." (R. 289).

"A. The girders are — there was no replacements to be made on the girders.

* * * * *

"Q. All right. Do I understand then that there were — that insofar as deterioration that the girders were all right?

"A. The girders were all right." (R. 391).

"Q. Okay. Now, as I understood your testimony a few minutes ago there was no replacement on the basis of your inspection to be made as far as the girders and the circle beam was concerned, is that right?

"A. That is right." (R. 415).

"Q. All right. So you made no other inspections of the tank until the fall occurred, is that right?

"A. My inspection had been completed. We determined what repairs we had to make." (R. 290).

"As far as I know, I am pretty sure Perry (Parker) and I talked over some of it, you know, the job, in this tank." (R. 397).

(4) TESTIMONY OF PLAINTIFF, DREW CHERRY:

"A. When he (Rollinson) came back down I was standing close, close by and he told Perry, Perry Parker, he said, many rafters are in pretty good condition, some of them a half inch thick.

"Q. Did he say anything at all to you all about the situation as far as the nuts and bolts up there in the upper supporting structures of this storage tank?

"A. No, sir, he sure didn't." (R. 269, 270).

"Q. Now, at the time that you all were working up there, am I correct in saying that the supporting structures were beneath where you were working?

"A. Yes, sir.

* * * * *

"Q. Were you able to see them where you were working?

"A. Not the ones that collapsed, they was right on the edge." (R. 230).

(5) TESTIMONY OF PLAINTIFFS' CO-WORKER, BENNY HARVEY:

"Q. Was there any statement to your knowledge made by Mr. Rollinson with reference to any of the bolts that he observed up there at the top of this tank?

"A. Not — No statement to me or to my knowledge. No, sir." (R. 190).

"Q. Now, had you heard or had there been any statement or warning made to you by Mr. Rollinson or any other persons there in Atlantic-Richfield regarding the condition of any of the bolts or nuts at the top of the supporting structures?

"A. No, sir." (R. 217, 218).

"Q. It (the warped rafters) was not at the point where you all fell, is that correct?

"A. No, sir.

"Q. All right. Now up on top of the storage Tank No. 521 were there any low places or indentations in the top of the tank?

"A. Yes, sir.

"Q. Were any of these around where you were (working) on the morning of August 5, 1968?

"A. No, sir.

"Q. Were any of those, to your knowledge, over the structural support points in this tank?

"A. No, sir, they were in between the structural points itself." (R. 191).

"A. * * * that would be the strongest points of the structural work is over these, in and around these columns.

"Q. All right, sir. Generally speaking, with reference to the part of this tank, you would anticipate that the safest place would be over these structural supports, is that correct, sir?

"A. Yes, sir." (R. 192, 193).

(6) TESTIMONY OF DEFENDANT'S WITNESS, PARKER:

"* * * the columns were in reasonably good shape." (R. 431).

"Q. * * * Is it correct that being over one of these structural supports is in all reasonable probability going to be about the safest place for someone to work or be on the roof of one of — one of these storage tanks?

"A. Yes, sir, I think I follow you.

"Q. And if you were to direct someone to what you would naturally assume to be the safest point on one of these storage tanks it would be where you figured one of these supporting structures would be located, is that correst?

"A. Right.

"Q. Now, would that have been the same situation on the morning of August 5, 1968, and with reference to storage tank No. 521, would you have felt the same way about that storage tank?

"A. Yes, sir." (R. 449, 450).

"Q. Now, the overall job as I understand it as it stood at the time that this incident occurred simply had gone through a portion of the removal of the roof on this storage tank, is that correct?

"A. Correct.

"Q. And you all had not actually gotten into doing any sort of job, work, or activities insofar as these supporting structures of this tank were concerned, is that correct?

"A. That's correct.

"Q. All right. And, as a matter of fact, the supporting structures were directly beneath the roof of this storage tank and as you were standing up there on the roof of this storage tank you couldn't see them, could you?

"A. From the top side, no, sir." (R. 444, 445).

"Q. * * * if you had had any prior warning or knowledge at all that these men were going to fall as a result of failure of one of these structural supports you wouldn't have ever sent them up there on that storage tank?

"A. Well, no sir.

* * * * *

"Q. * * * if you knew it was going to collapse you wouldn't have?

"A. Certainly not." (R. 450, 451).

(7) REPORT OF DEFENDANT'S SUPERINTENDENT OF SAFETY, H. D. BRITT, ENTITLED "521 TANK INCIDENT" AND DATED AUGUST 5, 1968:

"* * * Suddenly the center ring girder just above one of the tank columns came loose where it was bolted together by bolts through a short section of plate. This circular girder was an inner support for the roof rafters which were supporting the plates the men were standing on. As the inside end of rafters dropped the roof began collapsing at the center of the tank causing (Cherry) and Mullican to slide down the plates and fall to the bottom of the tank. * * *" (R. 20, 31, 33; Pl. Ex. 1, 2, R. 168).